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114-663

Supreme Court of the U. S.

OCTOBER TERM, 1884.

No. 163.

CALVIN A. STEVENS

vs.

CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, ET AL.

STATEMENT OF THE PLAINTIFF'S DEMAND.

JOHN A. CAMPBELL,
For Appellee.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

in arrear on the loan of the State to the Mississippi Central into the State treasury, from collections he had made under the fifth section of the act of 1852.

The State had been fully indemnified at that date.

There was no pretence for any claim for interest as due from the Mississippi Central. Neely's dep., p. 282. Porter's dep., p. 313. The plaintiff, on the case stated in the bill, does not show a debt for five thousand dollars, as due at the date of the decree in October, 1881, in the Circuit Court. Nor does he show jurisdiction upon the evidence submitted of the State, of the account between the State and the Mississippi Railroad Company.

XXII.

The State of Tennessee, the debtor of the plaintiff, is not a party to the suit. And in the absence of the debtor, the plaintiff proceeds against the defendants, as debtors of the State, for interest in arrear. Without proof of a debt, there can be no successful suit on a mortgage.

The decree must declare a debt.

We submit that the plaintiff does not show a case within the jurisdiction of this Court on appeal.

JOHN A. CAMPBELL,
For Defendant.

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STATEMENT OF THE PLAINTIFF'S DEMAND.

I.

The plaintiff, in the first paragraph of his bill, claims to be a holder of certain "*bonds loaned by the State of Tennessee* to the Mississippi Central Railroad Company," and sues on behalf (besides his own claim) "of all other holders of the internal improvement bonds loaned to that railroad company." The bill charges that the State of Tennessee, by the Act of 11th February, 1852, "*determined to lend to the railroad companies* within her limits and specified in the Act, the aid of its *credit* for the completion of their several lines" within that State.

The bill refers to statutes contemporary with the Act above mentioned, in which the legislature designates the bonds to be

issued, "as a loan made to internal improvement companies, and that provide for their execution and their registry and delivery to the companies: Record, pp. 15, 16. In eighteen (18) other places in the bill the bonds are designated as *bonds loaned to the companies*, and in the whole bill they are referred to distinctly as such. So, the records of the executive officers of the State, the governor in his messages, the comptroller, and the treasurer in their accounts and statements, and the legislature in enactments preserve this, as the description suitable, of the nature of the engagement these bonds originated. It is not a work of supererogation to ascertain something of the nature of such an engagement. We propose to enquire the meaning of the eighteen averments that the debt is for a loan of bonds.

II.

Of the Engagement Embodied in a Loan of Bonds.

Those who are in the habit of tracing to their source the relations existing under laws, ascribe to the *loan*, deposit, donation, pledge, and even exchange, a seniority to the sale, letting, hiring, partnership, mandate, in the intercourse of mankind.

In respect to the *loan*, there would soon follow a natural and a necessary difference in the obligation resting upon a borrower, arising in the difference of the subjects of such loans, and the use to be made by the borrower. This difference is expressed in the earliest codes of laws we have. The engagement of him who borrows a thing, to keep, and use, in a manner consistent with its preservation and safe return to the lender, is manifestly variant from the engagement, to receive for consumption, or disposition to others for consumption, or to hold as property and which is not to be specifically returned to the lender, but to be returned by a thing correspondent to the thing borrowed. The things of this latter kind are denominated fungibles in the Roman law, and the word is used among the civilians of Germany, France, Scotland, etc.

Heineccius states in his chapter "Quibus modis re contrabitur obligatio" (Titulus XV., Secs. 790–797,) as follows:

Sec. 790. Contractus dicuntur re iniré vel reales esse, non quasi actionem in rem producant; sed quia non capiunt substantium hi contractus, nisi rei traditio interveniat, vel datio.

Sec. 791. Tales ex veris et nominatis sunt quatuor: Mutuum Commodatum Depositum et Pignus.

Sec. 792. Mutuum est contractus, quo res fungibilis ita alicui datur, ut ejus fiat, et is quandoque tantumdem in eodem genere restituat. Res Vero Fungibiles dicuntur, quæ pondere, numero et mensurâ constant. In his enim tantumdem est idem.

Sec. 793. Ex quâ definitione sequitur, I. ut mutuum non sit, nisi pecunia, vel res fungibilis alia, saltem brevi manu tradatur, (Sec. 792, 11) ut mutuum sit alienatio et rei fungibilis dominium transferatur in debitorum.

Sec. 794. Quum ergo mutuum sit alienatio (Sec. 793, 11) infertur, I. Non nisi eum dare posse mutuum, qui potest alienare, adeoque. II. Si quis, qui alienare nequit, mutuum dederit, nummos stantes ex vindicari; consumtos bonâ fide condici; malâ fide, actione ad exhibendum peti posse. III. Idem obtinere si quis dolo malo pecuniam sine mandato domini dederit mutuam.

Sec. 795. Quamvis vero in mutuo alienetur species, non alienatur tamen quantitas (793*) ex eoque sequitur. IV. Ut tantumdem et quod ad quantitatem, et quod ad qualitatem reddendum sit. V. Ut conveniri quidem possit; ut minus, non ut plus reddatur, quam datum. VI. Ut mutato valore nummorum, ad tempus contractûs respiciendum videatur, nisi de certâ specie monetæ reddendâ conventum.

Sec. 796. Ex hoc contractu datur actio unica cognominis, nimirum Condictio Certi ex mutuo, Vel Actio Mutui, quâ creditor agit., adversus debitorem, ejusque heredem, ad tantumdem in eodem genere eâdemque bonitate reddemdum, non autem ad usuras quæ jure romano ex contractu strictu juris non debentur, nisi promissæ.

Sec. 797. II. Commodatum est contractus, quo res non fungibilis gratis utenda ita traditur, ut finito eo usu eadem species restituatur.

Elementa juris secundum ordinem institutionem, Tit. XV., pp. 200, per Jo Gotte Heineccius.

Mackeldey Manuel, book II., on Obligations, Secs. 396, 397, 399, 400, 401.

The conclusions contained in the extract we have thus made, show that *real* contracts are those which originate from the delivery of a thing, and that the *mutuum commodatum, depositum* and *pignus* are such contracts. *Mutuum* is a loan of fungible things. Fungibles are those which may be used indifferently, the one for the other, as being of the same kind and performing the same function. *Fungibiles res, dicuntur apud juris consultos quorum una fungi potest vice alterius;—Ducange glossarium.* The word is derived from *Fungor, fungi, functus sum,* to hold, enjoy, and to execute the duties of an office, and hence functionaries, functions fungibles. Dalloz says of them that commonly they cannot be employed without consuming them; as money, corn, wine, wheat, minerals, and which, in case of a loan the charge is not to restore the same thing lent, but things of the same quality and quantity.

6 Dalloz, Jurisp. Gen., p. 232; sec. 177.

Pothier adopts this division. The consumption in fact is that where the consumption is *natural,* and operates as a destruction or alteration of the thing; and he cites articles of food for men or animals, as instances. The *civil* consumption is where the thing is alienated and is placed out of the possession or reach of the borrower; money is an instance.

The duty of restitution in this class of cases is to return one of the same class or kind, that is the quality of fungibles attaches.

4 Pothier, p. 60, Art. III., Ch. I. Cases cited in the other brief.

In the case cited from the reports of the Privy Council, we find the following as taken from the *Termes de la ley*, printed in the reign of Henry VIII. We do not find this in the library edition. The quotation is: "As to borrowing a thing perishable as corn, wine, money or the like, a man from the nature of the thing must have an absolute property in them, otherwise, it could not supply the uses for which it was lent. Therefore he is obliged to return something of the same sort, the same in quantity and quality, with what has been borrowed.

South Australia In. Co. vs. Randell, L. R., 6, Moore, P. C. 341, [redacted]S.

Chancellor Walworth recognizes the difference between fungibles, and things which are loaned to be returned in the same articles specifically, and says the question does not arise for consideration in the case. He says "there is no doubt that upon an ordinary loan of 100 shares of stock of a particular corporation, or of other stock of a like nature, where one share of stock is just as good as another, it would only be necessary to return the share of stock in kind. The loan in such case is a sale to be repaid in kind and quantity, and the title to the fungible loaned is *immediately transferred to the borrower*. Whereas, upon the loan of specific articles to be returned in specie, the title remains in the lender and the borrower is only entitled to the temporary use thereof."

Dykes vs. Allen, 7 Hill N. Y. R., 498.
4 John, Ch. R., 490, 7 Ibid., 69.
Fosdeck vs. Greene, 27 Oh. St., 484.
Doctor and Student, ch. 38, sec. 2.

We have thus ascertained the characteristic features of the contract of loan where the subjects of loan are "true quantities," or fungibles. The contract, as we have seen, is an unilateral contract as well as a real contract. The borrower is the only party obliged, because the lender in making the delivery fulfils all that he is to

do as a lender, and the obligation of the borrower is generated at the date of this delivery. Pothier (p. 64, sec. 36, to. 4, *Traite du pret*) says, "the obligation that the borrower is subjected to by this contract is to the lender, and consequently the action which results from this obligation can only be acquired by him, and it is only him and his heirs, or universal successors, who have the right to sustain it." The action, as stated in the citation from Heineccius, is to obtain a definite quantity, as determined in the loan for consumption, of the same kind and quality as the thing lent. The action would not be for the identical thing loaned, but similar.

1. The State of Tennessee in the delivery of her bonds to the Mississippi Central conveyed a title. The bonds were negotiable; they were made for the precise purpose of negotiation by the railroad company, as owner, and were negotiated by sales without any warranty or endorsement, made by the railway company or companies.

2. It was not necessary that the loan should be gratuitous. Loans upon interest, or for a retribution are frequent and those are regulated by the same principle, in respect to restitution of a similar and not the identical thing.

3. All loans are subject to a condition of restitution determined expressly in the contract, or implied as to time and manner under the general law concerning loans.

The plaintiff in this case contends that the obligation of restitution did exist, as in the case of a *commodatum* by contract. The specific bonds lent were to be returned to the State by the borrower; and that the State, the plaintiff asserts, could not alter or modify this obligation, because the holders of the bonds lent were entitled and had a vested right in this condition and the correspondent duty of the railway company to fulfil it. On the other hand the railway company, supported by the State of Tennessee, affirms that no debt or duty was imposed upon the company to the holders of the bonds, and that the State, so far from granting such a title to the bondholders of the State, habitually asserted her exclusive

authority of legislation and action in respect to these companies. And the State, finally, in the Acts of 1869 and 1870, proposed to the companies, one and all, to make a payment of these debts in bonds equal in amount, bearing the same interest, payable at the same time and containing the identical obligation such as was contained in the bonds lent.

II.

There is no controversy between the State of Tennessee, the lender, and the Mississippi Central Railroad Company, the borrower. By the Act of the lender, the liquidation and payment of this debt of the Mississippi Central, was made for the entire sum in bonds of the same quantity and quality as those received from the State.

Let us concede that the exact and particular form that was adopted in the final settlement might not have been that which was contemplated by the parties when the bonds were delivered; both, probably, supposed there would be a gradual liquidation through collections from the companies, semi-annually, under the clauses relative to a sinking fund. When we consult the position of the lender, the State of Tennessee, the end proposed by that creditor in the enactments relative to the loan, the circumstances and the conditions of the contract as made, and the duties and restraints and requirements imposed on the borrower, in a word, the elements which determine the intention of these parties, could there be found a more equitable mode of liquidation than that proposed by the State and accepted by the railway company in 1877–8. The State received payment in *full* from the companies in the obligations of the State, identical in amount and character of these she had issued. She would not have been more benefitted by receiving from each company bonds originally delivered to them. The Acts of the Legislature of Tennessee empowered every holder of her bonds to invest them in the liens she was invested with. No partiality was displayed in respect to any issue of bonds; no discrimination was made among any holders.

The bonds were of the *same* obligation; and payment to the State in any of them, operated to discharge of the *same* amount of the public debt. Nor did the offers of the State involve any hardship to her debtor corporations. The State had uniformly treated her own debt existing in bonds as imposing an obligation of the same degree, without any distinction, in respect to each particular portion of it. Thus as between the State and the debtor corporations there could be no cause for complaint and no complaint has been made by them.

III.

The complaint is made by holders of the bonds of the State. They claim that the railway corporations are debtors, not of the State of Tennessee, but to whomsoever the bonds issued to them respectively for the amount of the interest and the principal.

Recurring to the circumstances which attended the legislative enactments by the State of Tennessee, we find that those Acts abound with careful considerations, cautious provisions, stringent regulations, onerous conditions, and summary remedies. The State of Tennessee, the creditor, adopts all of these for her own security and to relieve her from hazard of loss. She reserves a plenary power to legislate in future. She invests herself with a *real right*, an *estate* in all of the property of the railway corporations who shall receive her bonds. This property is all submitted to her legal control under particular and well defined conditions, and through such control there is authority to dispose of that property in some cases and in others to possess and to manage it. Moreover, the legislature might make laws to protect the interests of the State and to prevent loss.

The railway corporation is the subject of the State, and the property is fixed property within the jurisdiction. The State in all of these laws, asserts that her relation is that of a legislator, and her right is that of a creditor who has lent bonds to the corporation.

In no Act is there power or authority delegated to the holder of State bonds issued under the Acts relative to internal improvements.

While the relation of creditor and debtor is declared as existing in full force by the State of Tennessee in all of the departments of the State government, and recognized by all of the corporations, so that this plaintiff could not frame this bill without its recognition and affirmation twenty times, for the first time in the year 1879, and not until after the Acts of 1869 and 1870 had exhausted all of their authority in the liquidation of the debt between the State of Tennessee and the various corporations, have we been able to find in any record of any Court an assertion of any holder of any bond of the State a title to such relief as is prayed for in this bill.

No memorial to the legislature by the holders of such bonds; no address to the Governor of the State; no suit in any Court; no admonition, warning claim sent to any railway corporation, sets forth the pretensions embodied in the bill of this plaintiff, prior to the filing of this bill and others contemporaneous with it.

IV.

Payment implies the liberation of a debtor from the obligation contracted to his creditor. The same conditions are requisite in the extinguishment as in the creation of the obligation. The co-operation and consent of the parties to the contract. Creditor and debtor agree and assist. *Solvere dicimus eum qui facit quod facere promisit* is a payment. So a novation extinguishes a debt, and is equivalent to a payment. The State proposed a *novation* of the debt due by the borrower. This was accepted by the Trustees, and they were substituted for the State in all of her legal rights. The State renounced her demand on the corporation, and surrendered her debt to the Trustees.

The plaintiff does not pretend that the bonds or coupons of the State in their possession afford any evidence of a debt against the

Mississippi Central. That corporation borrowed those from the State and became indebted for that loan to the State of Tennessee. The obligation is an indivisible obligation between ascertained juridical persons, whose relations had a determinate character at the date of the delivery of bonds by one and their receipt by the other. These juridical persons in November, 1877, again met and dissolved the relations, by a novation consented to by both of them. The declarations in the Act of the State of Tennessee of 1852, that the mortgage lien was invested in the State, without a deed from the company for the payment of the bonds and the interest to accrue, did not confer a title upon the person or the succession of persons into whose hands those bonds should come. The implication of the act was that the borrower should account with the lender. This was the obligation then arising and some act was required from the lender to alter the conditions.

Lord Bacon describes the difference existing between grants and declarations. A grant is not countermandable; and declarations are countermandable; "*unless there be some new act or conveyance to give life and vigor to the declaration precedent.*" Bacon's Maxims, Rule XIV. Under the principle of this rule what we have said in other briefs in this case relative to the parties to contracts, and all we have said applies particularly, to that habit of ransacking the Statutes of State Legislatures so as to find some contract indelible and irrevocable in some vague and equivocal expression. In these Statutes of Tennessee the legislature in every section speaks with authority. There is command to the corporations, a requirement by a superior to a subject or subjects. The State dictates a system and prescribes methods. When the State proposes to make a contract she embodies the terms in a separate well-known commercial effect—a negotiable bond—authenticates the bond by affixing her seal.

The bond refers to the legislature, only to show that there was *legislative authority* for the issue of the bond, by the executive

officers. If there had been a purpose to transfer, or to assign, or pledge the mortgage lien to the holders of the bonds of the State, so as to give "life and vigor" to the promise of the State, here we should expect to find it. Nothing appears in the bond on the subject. The third and fourth sections of the Act of 1852 in declaring the object of the legislature in the investiture of the State with a real right in the property of the corporation do not express or imply either a delegation or cession, or assignment of any interest or claim to those who might thereafter become owners of the State bonds. Those owners are not designated. The authority to enforce the lien is not conferred, nor is any regulation for the pursuit of the railway corporations prescribed. The contrary of this is apparent in the reservation of powers to issue process in favor of the State, to maintain suits for a sale of the property, and to appoint receivers to manage it, to the Governor.

To acquire a right or interest in an accessory stipulation in favor of one not a party to a contract nor a privy to the consideration, there must have been some affirmative act of assertion. The parties contracting have an incontestable right to revoke such a clause until the person to be benefitted accepts it and makes himself a party. The law permitteth every man to part with his own interest, and to *qualify his own grant*, as it pleaseth himself; and therefore doth not admit any allowance or recompense, if the thing be not taken as granted. Bacon's Maxims, Rule IV.

The State of Tennessee in 1869 and 1870 proposed to the railway corporations and to the holders of the bonds issued by the State, the cession, transfer, or extinguishment of the mortgage lien reserved in the Acts of 1852. Any of the corporations might *pay* the State of Tennessee in bonds of the like quantity and quality of those received from the State and discharge herself.

2. Any corporation or individual might intervene with the consent of the debtor corporation, might acquire the lien of the State by making this payment.

3. Any holder of bond or bonds might acquire an interest correspondent to the amount of his bond or bonds in the mortgage lien by surrendering the bonds and obtaining a certificate of cession and transfer.

In 1877 the Mississippi Central Railroad Company had become extinct, in consequence of consolidation agreements, and judicial sales of property and franchise and re-organizations under enabling statutes.

The State of Tennessee in February, 1876, had taken possession of this railroad property and was in possession in November, 1877. All the *interest in arrears was paid in money, at that date,* into the Treasury. The State claimed the payment of the sum due as principal of the loaned bonds upon the conditions of the Acts of 1869 and 1870. The debt was paid in full by the owners of the railroad property as derived from the sales in the Courts of the United States. These owners were not bound for the debt of the company to the State, but their property in Tennessee was bound and their interest demanded a release from the State of her prerogative jurisdictions and estate. No bondholder had ever presented a claim upon that corporation as a debtor, nor asserted a right upon the property as vested in or bound to them.

The Acts of 1869–70 were in force and had been maintained as valid, operative and effectual till the time when action on the part of these defendants had been entirely accomplished.

No opposition was made to the settlement by the defendants, by these bondholders. The settlement was hailed with satisfaction by those of them who were seeking an adjustment of their claims.

Under these circumstances, whatever claim of equity existed, surely must disappear before the equity which the defendants held. They are purchasers from the State of Tennessee; the State of Tennessee was invested with a lien upon all of the property of the Mississippi Central Railroad Company within Tennessee, and had taken possession and had managed it for thirty-three months and collected as revenue $802,241, and paid into the Treasury

$110,000. It was held two months after this suit was commenced.

At this time the State of Tennessee was satisfied in full and held no demand.

The bill of the plaintiff was anterior, but subsequent to the payment made by the railway corporations.

JOHN A. CAMPBELL,
For defendant, Illinois Central Railroad Company.

APPENDIX.

EXTRACT FROM INSTITUTES OF MENU. PUBLISHED BY SIR WM. JONES IN 1794. CHAPTER VIII, P. 189.

1. A King desirous of inspecting judicial proceedings must enter the Court of Justice, composed and sedate in demeanor together with Brahmins and Counsellors who know how to give advice.

2. There either sitting or standing, holding forth his right arm, without ostentation in his dress and ornaments, let him examine the affairs of litigant parties.

3. Each day let him decide cases under the eighteen titles of the laws, by arguments and rules drawn from local usages and from written codes.

4. Of these, the first is *debt, on* LOANS FOR CONSUMPTION: the second, deposits and LOANS FOR USE; the third, sale without ownership; the fourth, concerns among partners; the fifth, subtraction of what has been given.

5. The sixth, non-payment of wages or hire; the seventh, non-performance of agreements; the eighth, rescission of sale and purchase; the ninth, disputes between master and servant.

6. The tenth, contests on boundaries; the eleventh and twelfth, assault and slander; the thirteenth, larceny; the fourteenth, robbery and violence; the fifteenth, adultery; the sixteenth, altercation between man and wife and their several duties; the seventeenth, the law of inheritance; the eighteenth, gaming with dice and with living creatures.

These eighteen titles of law are settled as the groundwork of all judicial proceedings in the world.

II.

Contract of Loan.

The contract of loan (*mutuum*) is of the class of contracts unilateral; for they produce an obligation only on one side. The lender by this contract obliges the borrower to him, but he does not contract, on his side, to the borrower any obligation. . . .

The terms loan for consumption explain that those things susceptible of this contract are such as are consumed by the use made of them. The first species are such as that the use made of them is a natural consumption and a destruction of the things. Such are things which serve as food for animals or men, etc., . . .

The second species are things of which the consumption made is not a natural but a *civil* consumption. Such is the consumption made of ready money in the use made of it. The use made consists in expending it, which is not, in fact, a natural consumption, for there is no destruction of the coin, but a civil consumption, which consists in the alienation made of the sum expended, so that nothing remains to the borrower—it is consumed for the borrower when it is expended by him. . . .

The contract of loan for consumption produces an obligation only on one side. It is the borrower who, by this contract, contracts to the lender the obligation to the lender to render to him the same sum or the same quantity which he has borrowed. . . .

The action which arises from the obligation which the borrower contracts is a personal action, which, according to the nature of personal actions, can only be commenced against him who constructed the obligation, that is, against the borrower, his heirs, or successors.

It cannot be brought against others, though they may have profited by the loan.

If you have borrowed a sum in order to lend to another, and you have so lent it to him, nevertheless you have no action except against him to whom you lent the sum. . . .

The obligation that the borrower is bound by this contract, and consequently the action he is subject to because of it, affects him only and his heirs, etc. The lender is he in whose name the sum or the thing which is the object of the contract is counted or delivered to the borrower, whether one or another may have performed the acts of counting or of delivery.

Pothier, du Pret de consumption, To. 4, pp. 59, 60, 61, 62, 63.

III.

In Re Engineering Company, 16 Ch. D., 125.

"Supposing, however, there was a contract, it is then contended that a mere contract between two parties that one of them, Shaw, shall pay a certain sum to a third person not a party to the contract will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between A and B, that B shall pay C (an agreement to which C is not a party either directly or indirectly), will not prevent A and B from coming to a new agreement the next day releasing the old one. If C were a *cestui que trust* it would not have that effect."

One may find in a statute words which establish a relation of trustee and *cestui que trust*. But it is not the place to look for such relations in respect to property. Laws are designed to operate directly, not circuitously upon persons affected by them. A State, having sovereign powers and multifarious interests and relations, is not fitted to be a trustee, and is not easily brought to an account—as such—by the *cestui que trust*. But, if we shall assume that the State of Tennessee made the sections three and four in the Act of 1852 with an eye single to the establishment of her system of internal improvements in the State, and to protect her own interest and to avoid hazard or loss by her loans, the Act is intelligible. The State is the lender of the bonds issued to the companies, she is the obligor bound to the holders, and her interest is

that the obligations shall be cancelled. The corporations alone are obliged to her as borrowers to do the thing specified in the Acts. The State is invested with the lien on the corporation property to compel the corporations to accomplish the liberation of the State. The State commands or stipulates, if we treat this as contractual, for her liberation protection, security from loss. She takes from the corporations a permanent and exclusive mortgage whereby she herself may enforce the discharge of her own obligations out of their property. She is the conservator of her own interests; she has the management of the securities with which she is invested. There is no contract in favor of a third person in the Act. An acceptance of the Act by a bondholder would have no significance, for the State is not subject to compulsion or constraint.

A simple indication or declaration that this lien is invested in the State for the payment of the bonds and coupons delivered to the corporation, imports nothing of legal right. There is no exclusive attribution, such as would result from an assignment or cession or specification of a judicial procedure, and followed by a communication to the parties holding the bonds and coupons.

On the other hand, all of the clauses of the act, the aims they proposed for accomplishment, and the instruments to be employed in their attainment, show that the State was regarded by the corporations and by the legislature as the only guardian of the interests involved, charged with the fulfilment of all that circumstances might dictate in respect to them.

JOHN A. CAMPBELL,
For Appellee.

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114-663

IN THE

Supreme Court of the U. S.

No. 163.

CALVIN AMORY STEVENS,
Appellant,

vs.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY ET ALS.

BRIEF FOR THE DEFENDANT,
THE C., ST. L. & N. O. R. R. CO.

JAMES FENTRESS,
Of Counsel for Appellees.

RAND, McNALLY & CO., PRINTERS, CHICAGO.

Supreme Court of the United States.

No. 163.

CALVIN AMORY STEVENS,
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vs.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY ET ALS.

BRIEF FOR THE DEFENDANT, THE C., ST. L. & N. O. R. R. CO.

JAMES FENTRESS,
Of Counsel for Appellees.

Appeal from Judgment of the Circuit Court of United States, at Memphis, denying any relief and dismissing complainant's Bill.

JURISDICTION OF APPEAL.

1. On page 17 of Bill, appellant claims the amount of $1,260 of coupons, due at time of suit brought in 1879.

Record, page 17.

The bonds are not due until January 1st, 1892.

Record, page 608.

In August, 1880, when complainant's deposition was taken, he proves that he then held 117 past due

coupons of $30 each, amounting to $3,510, thirty of which matured after suit brought.

Record, pages 608–9, and 568.

The amount due at time of final decree and appeal was not exceeding $4,110.

By Act of Congress, approved February 16th, 1875, Sec. 3, it is provided that "such judgments and decrees hereafter rendered shall not be re-examined in "the Supreme Court unless the matter in dispute "shall exceed the sum or value of five thousand "dollars exclusive of costs."

U. S. Stat. at Large, 43rd Congress, 1873–5, Vol. 18, Part 3, page 316.

2. There is no promise or obligation of defendants to pay these bonds and coupons of the State of Tennessee, so far as appears from said bonds or coupons, or anything to which they refer.

The bonds and coupons produced are the obligations of the State of Tennessee alone, "for the performance of all which the faith of the State of Tennessee "is hereby irrevocably pledged." Nor is there any reference to the defendant or other railroad company, in the bonds or coupons (Record, pages 607–8), nor to any other paper, act or document, which shows any promise of the defendant company to answer for the debt of the State.

The only reference in the bonds, is that they are issued "in pursuance of, and under the provisions of "*an* Act of the General Assembly of said State, "passed at its session of 1851–2."

There are seven different Acts of 1851–2, authorizing and directing State bonds to issue:

Chapter XCIV, to build State capitol.

Chapter CX, to build turnpike road.

Chapter LXXII, to build E. T. & V. Railroad bridges.
Chapter LXXXIX, to build E. T. & Ga. bridges.
Chapter CLIII, funding and renewal bonds.
Chapter CCXXIX, parceling out bonds to E. T. & Ga. R. R.
Chapter CLI, to *fifteen different* railroads.

The Mississippi Central Railroad Company is not mentioned in *any* Act of 1851–2, nor is any provision made in *any* Act of that session authorizing State bonds to issue to it or any of defendants' companies.

Indeed, none of said railroad companies were in existence in 1851–2.

The Statute of Frauds prohibits any action on a promise to pay the debt of another unless such promise is in writing and signed by the party sought to be bound, or his agent.

Acts of Tennessee, 1801, Ch. XXV, § 1.
Code of Tennessee, § 1758.
29 Charles II, Ch. III, § 4.

3. The lien is sought to be established against property which, long before suit commenced, had been seized by and sold at suit of existing creditors by decrees of Circuit Courts of United States, and purchased and paid for by *bona fide* purchasers.

Record, pages 563–4, 775.

Neither the bonds or coupons, nor any mortgage or lien claimed by complainant was ever registered in any county where the property was situate.

Such liens or mortgages "not so proved or acknowledged and registered shall be null and void as to "existing and subsequent creditors."

Act of Tennessee, 1831, Ch. XC, §§ 1 and 12.

This act is a "general law of the land," and within the meaning of the Constitution of Tennessee prohib-

iting the legislature from suspending any general law for the benefit of *individuals*, and from passing any law inconsistent with the general laws of the land.

Constitution of Tennessee, Art. II, § 8.

4. The open and general conduct of complainant and the other members of the committee of Tennessee bondholders, and the action of the purchasers thereon, in paying the whole debt to the State.

The urging the State to compel the railroads to settle with the State under the Substitution Acts of Tennessee.

The delay of a quarter of a century to give notice of or assert the lien now claimed.

The impossibility of putting the parties in *statu quo* make it, in the language of this Court in a similar case, "manifestly inequitable and unjust to grant his prayer."

Chamberlain vs. St. Paul, etc., R. R. Co. et al., 2 Otto, 307.
Greenleaf on Evidence, § 207.
Story's Equity, §§ 387-8 and 390.
5 John's Ch. R. 184; ibid. 268.
2 Woods, 132.
12 Wall, 683.
Perry on Trusts, § 870, and authorities cited.
Jones on Mortgages, § 603.

5. Whatever be the true construction of the Internal Improvement Acts of Tennessee, whether the State reserved a lien to secure a debt due by the railroad companies to her, and for her benefit alone, or whether she was a trustee for the bondholders, and the bonds a lien upon the railroads, yet in either case and by every construction the State had the right to seize the railroad in case of its default in paying interest, and collect the money.

In this case the State did seize the property, on

account of the unpaid interest (Record, page 337), and did collect by her receiver $802,241.52, in money (Record, page 282), and of said sum paid into her treasury in money $110,000 (Record, page 286)—more than enough to pay all arrearages of interest and all of complainant's bonds which are not yet due beside.

In short, if complainant's construction is correct, then complainant's trustee, in accordance with the terms of the trust, has seized the trust estate, and collected in *money*—not in bonds—from the debtor, the very overdue interest which complainant bases his suit on; and complainant, without asking his trustee to hand over the money collected, is attempting to collect it again of the debtor.

Record, pages 314, 315, 286, 358, 420, 282.

6. If the State, under sections 3 and 4 of the statutory mortgage, was a trustee for the bondholder, yet, by section 12, the bondholder agreed that such trustee had "the right to enact by the legislature thereof all "such laws as may be deemed necessary to protect the "interest of the State, and to secure the State against "any loss." And there is no proof in the record that the subsequent acts of said trustee were in bad faith, or against the interest of the State or her bondholders. On the contrary, the record abundantly shows that the alleged trustee tried every expedient to save the debt —even advanced large sums of money to repair and place the railroads in a position to secure the debts; and, as a last resort, and manifestly to the interest of all parties, sold the railroads, or compelled the return of an equal number of State bonds of equal value to those loaned.

7. If the State was a trustee, the sinking fund, which would have paid principal of debt, before maturity of bonds, was by the terms of the trust to be paid alone in any of the bonds of the trustee, into the treas-

ury of the trustee, after having them assigned to the Governor of said alleged trustee; and the only difference between paying in the bonds of the alleged trustee from time to time as a sinking fund, and paying them under the Substitution Acts, is that, under the latter, the debt was paid sooner than it would have been under the former.

8. In this case the receiver appointed by Circuit Courts of U. S. for the whole railroad, offered to pay in money the past due interest to the State, in order to relieve that part of railroad in Tennessee from the possession of the State's receiver, and it was refused. Record, pages 321–2, Ans. 46 of Governor J. D. Porter. There were propositions to settle the past due interest and sinking fund, which were also refused.

Record, page 287, Ans. 6 of Comptroller Gaines.
Record, pages 282–3, Receiver Neely's Dep.

The persons expecting to purchase, and who afterward purchased the whole railroad, then went to the State authorities, the alleged trustee, *before* the purchase, and asked how the claim against, and State receiver of that part of, the railroad in Tennessee could be settled and relieved, so they could know in advance how much to bid at the foreclosure sale in U. S. Courts, and were informed by said alleged trustee "that the State had an exclusive lien on the Tennessee part of the road;" and that the debt could be paid in any bonds of the State; and that the Tennessee receivership would not surrender that part of the road, nor the State be satisfied until the whole debt to the State was so paid; and in the words of the Governor: "I employed this power to coerce the purchaser to pay off the entire debt."

Record, page 322, Ans. 48.
Record, page 287, Ans. 6 and 7.
Record, pages 282–3, Ans. 23 and 24.

The purchaser thereupon afterward bid for and purchased the whole road, and settled the whole internal improvement debt, as required by said alleged trustee, the State.

Record, pages 283, 287-8-9, 322-3.

So the alleged trustee of complainant not only collected $802,241.52 in money out of the trust estate, while in her possession (Record, page 282, Receiver Neely's Answer 21), and placed in her treasury $110,000 thereof in money, but said alleged trustee "coerced" the purchaser to pay in *also* "the sum of "twelve hundred and ninety-three thousand two hun-"dred and thirty dollars in the bonds and coupons of "the State," (Record, page 295, Ex. 1 to Comptroller Gaines' Dep.; Record, pages 283, 322), and that, too, when at that time "at least half of" the $1,199,000 of bonds claimed to have been issued to said railroad had already before that "been paid in and canceled, and deposited in the archives of the State."

Comptroller Gaines' Dep., Record, page 291, Ans. 18.

Governor Porter's Dep., Record, page 312, Ans. 22.

The whole amount of said bonds claimed by complainant to have been issued to said railroad company being $1,124,000.

Record, page 17.

Now add to this, that Peter Geddes and E. D. Morgan, members of this "committee of Tennessee bondholders," of which complainant is secretary and treasurer, on Feb. 23, 1877, speaking for the creditors of the State, in a letter addressed to the Governor, urge the Governor, "that the debtors of the State be required "within a reasonable time, say, by or before July 1st, "1877, to pay off every obligation due from them to the "State, *as now they may do*, after which such advances

"as were specifically made to each, to be receivable in "payment or cash." "We submit to your Excellency, "whether there would be any hardship or injustice in "requiring this, and assure you the creditors of the "State would regard such a step as one taken in the "right direction." Complainant's Dep., Ex. 6, Record, pages 738–9. Governor Porter's Dep., Record, page 319, Ans. 40. Urging the very thing which the Governor six months afterwards "coerced" defendant to do as aforesaid. The complainant, the secretary or treasurer of said "committee of Tennessee lien bondholders"—who was fully advised of, and aiding all proceedings and dealings with the State—signed the letter of Feb. 15, 1877, to the Governor.

Record, page 351.

Gov. Porter's Dep., Record, pages 320, 321, Ans. 42, 43.

Record, pages 369, 384, 386, 388, 390, 391, 394, Exhibits to complainant's and J. D. Porter's Deps.

Complainant's Dep., Ans. 41, 42, and 69–73, and Ans. 74, Record, pages 584–5.

So well advised were they that on Aug. 1, 1877, twenty-one days before the purchase of the whole railroad by defendant, one of this "committee of Tennessee bondholders" writes the comptroller that the purchaser would pay off the debt of the Mississippi Central to the State as soon as it was safe to do so. Record, page 375, Ex. 5 to Gov. Porter's Dep. And four days after the sale, to wit, on August 27, 1877, this member of "the committee of Tennessee bondholders" informs the State officers that he had just had a conversation with the president of defendant's railroad company, and that as soon as the purchase is confirmed they will pay off the debt, and adds, "It is quite well under-"stood here, that so soon as they can do so with safety, "they will pay off the lien of Tennessee on the Missis-

"sippi Central, and that they now think they can safely "pay it off sixty days hence." Ex. 7 to J. D. Porter's Dep., Record, page 378. And on August 23, 1877, this member of the "committee of Tennessee bondholders" informs the State that "the Mississippi & Tennessee "Railroad Company have voted to pay off their debt to "Tennessee," and adds, "this practically settles up all "advances made by the State to railroad companies, "and reduces the whole State debt question to one "between the people of Tennessee and the investors in "their public debt."

Ex. 6 to Gov. Porter's Dep., Record, page 377.

One other fact—the Bill lays stress on the alleged fact, that the railroad company got the benefit of the bonds claimed to have been issued to it. The answer denies this. The proof does not show that the railroad company got the benefit of the bonds; nor that any part of the railroad or superstructure was bought or built with the proceeds of any of said bonds, but, on the contrary, the proof does show that $550,000 of said bonds were practically stolen.

Neely's Dep., Record, pages 279, 280, 281.

Considering these facts the complainant's claim *now* is not merely inequitable, but approaches the boundary of actual fraud.

9. The State, by Act approved March 17, 1873, made a proposition to her creditors to fund their coupons (section 1) and register their bonds (section 9); and by section 3 provides "that the faith, honor and credit of the "State of Tennessee is hereby pledged for the pay- "ment of said bonds at maturity; and for providing a "sinking fund for that purpose, and for the prompt "payment of interest on said bonds, as well as the "interest on the registered bonds hereinafter provided "for, commencing with interest to fall due the 1st day "of July, 1874. And it is *hereby made the duty of the*

"*treasurer of the State to set apart for that exclusive* "*purpose* so much of the revenues as may be necessary "to pay the interest on said bonds, commencing with "the interest that falls due the 1st of July, 1874."

Complainant accepted this Act, and all his bonds were registered.

Record, pages 590, 610, 292.

There was in the State treasury for the year 1877 $1,320,920.97, for 1878 $656,528.84, and for 1879 $491,-931.89; and at the time the Bill was filed in this case there was in the State treasury $411,408.64 (Record, page 420); and yet complainant has never asked the treasurer or State for it, nor demanded the payment of his coupons, as provided in said contract.

Record, pages 420, 410.

Having made this contract, and shown no consent of railroad company, and the company having paid the State in full, complainant must collect his claim from the State, or show good cause why same was not done, neither of which is done. On the contrary, the record shows the funds on hand, and the contract makes it the duty of the treasurer to set apart for that exclusive purpose a sufficient amount of said fund.

Complainant admits he has never made application to treasurer to set apart or pay out such funds, nor taken any step to collect or receive the same.

Record, page 601, Cross-ques. 162.

10. Complainant's construction of the Act of February 11, 1852, is shown to be erroneous by the natural meaning of the language used—by the express reservations of the 12th section of said Act—by the prior legislation and history of the State—by the subsequent legislation and history of the State—by contemporaneous construction—by the uniform construction of and practice under it for a quarter of a century,

not only by the State, but by the railroads, and also the State bondholders themselves.

And then by putting the Act in operation, and testing its proper construction by its practical workings and results, where the railroad company strictly complied with all its terms, where railroad company defaults in payment of interest, where there is default in paying in sinking fund, and where the railroad company fails to pay the debt to the State at its maturity.

2 Just., 282.
Broom's Legal Maxims, 824.
Kent's Com., Vol. I, page 465, and note.
6 Wheaton, 418.
Scanlan vs. Childs, 33 Wisconsin R., 666.
Union Ins. Co. vs. Hoge, 21 Howard R., 35.
Rogers vs. Goodwin, 2 Mass., 475.
17 Mass., 122, 144.
3 Pick., 517.
10 Wis. R., 136.
Dixon vs. Doe, 1 Smedes & Marshall's Miss. R., 70; ibid., 151.
8 Mass. R., 418.
3 Mass., 17.
1 Pick., 248.
2 Bailey R. (S. C.) 541; ibid., 554.
Cooke's Tenn. R., 258.
6 Bart. (N. Y.) 60.
17 Vermont R., 479.
1 Wheat., 115.

ARGUMENT FOR APPELLEE.

I.

Appellant in his Bill, filed January 24, 1879, claims to be the holder of six coupon bonds of the State of Tennessee, due in 1892, and of "seven coupons attached to each one of said bonds, the same representing the installments of interest for three and one-half

"consecutive years, beginning with the installment "that fell due 1st of January, 1876, and including the "installment of the first day of January, 1879." Record, page 17. Each of said coupons is for thirty dollars. He seeks to subject the railroad, purchased at foreclosure sale in 1877 by one of the appellees, to the payment of his claim.

The bonds and coupons are as follows:

M. UNITED STATES OF AMERICA. M.

No. 3623 B.

STATE OF TENNESSEE.

Printed Record, pp. 607-9.

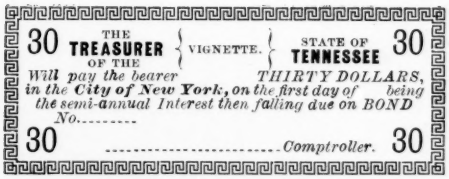
KNOW ALL MEN BY THESE PRESENTS, that the State of Tennessee acknowledges to owe to
or order, one thousand dollars, lawful money of the United States, which sum the said State promises to pay in the City of New York, on the first day of January, 1892, with interest at the rate of six per cent. per annum, payable semi-annually, according to the tenor, and upon the presentation of the coupons thereto attached. For the performance of all which the faith of the State of Tennessee is hereby irrevocably pledged, as this bond is issued in pursuance and under the provisions of an Act of the General Assembly of said State, passed at its session of 1851–2.

In witness whereof, I, Andrew Johnson, Governor of said State, have hereunto signed my name and caused the same to be countersigned by the Secretary of said State, and the great seal of said State to be hereunto affixed, at Nashville, this first day of January, 1856.

ANDREW JOHNSON,
Governor.

F. N. W. BURTON,
Secretary of State.

$1,000. $1,000.



II.

Certainly, so far as the coupons sued on are concerned, or the bonds to which they belong, upon which alone this suit is founded, there is nothing but an obligation of the State of Tennessee; and unless complainant shows in some legal way that there is some agreement or promise of defendant to pay said coupons, this suit must be dismissed.

In search of the hidden link that binds the defendant to pay the plain obligation of Tennessee alone, and establishing therefor a lien upon the property of defendant, two things must be borne in mind:

1. That by the Statute of Frauds "no action "shall be brought whereby to charge the defendant "upon any special promise to answer for the debt, "default or miscarriage of another person," or upon "any agreement or contract which is not to be per- "formed within the space of one year from the "making thereof, unless the promise or agreement "upon which such action shall be brought, or some "memorandum or note thereof, shall be in writing, "and signed by the party to be charged therewith, "or some other person by him thereunto lawfully "authorized."

Acts of Tenn., 1801, Ch. XXV, § 1. Code of Tenn., § 1758.

2. As to the lien of such obligation, the *lex rei sitæ* requires all mortgages and deeds of trust, of either real or personal property, to be registered in the counties where the property is situate, and provides

Act of 1851, Ch. XC, §§ 1, 12.

that "any of said instruments not so proved or "acknowledged and registered, or noted for registra- "tion, shall be null and void as to existing and "subsequent creditors," etc. This is a "general law "of the land," within the meaning of the Constitution of Tennessee, which declares that "the legisla- "ture shall have no power to suspend any general "law for the benefit of any particular individual, "nor to pass any law for the benefit of individuals "inconsistent with the general laws of the land."

Constitution of Tenn., Art. 11, § 8.

So that, in order to bind defendant to pay the coupons of said bonds of the State of Tennessee, as its name does not appear on the bond or coupon as maker, surety, indorser, guarantor, or otherwise, it is not only necessary to show a promise to do so, but it must be a promise in writing, signed by defendant, or some one by it thereunto lawfully authorized.

And in order to establish a mortgage lien for said Tennessee bondholder over the property of defendant, as against its other creditors, the mortgage securing such lien must have been registered, or he must show that his mortgage is not affected by said registry laws, or the provisions of the constitution hereinbefore mentioned.

It is not pretended by complainant that defendant is the maker, indorser, surety, or guarantor, on the coupons sued on, nor on the bonds, nor that there is any written promise on the part of the defendant to pay said coupons, nor any promise whatsoever directly to the holder of said coupons.

Nor is it pretended that there has been registered any mortgage which secures complainant's coupons.

The bonds and coupons sued on purport to have been issued twenty-three years ago, and complainant does not pretend that any claim has ever been made on the railroad company for the payment of said bond, or its heretofore maturing coupons. Indeed, it appears from the proof of complainant that he never

Record, p. 580.

at any time claimed from the railroad anything on account of said bonds or coupons, except by this suit. The coupons paid for twenty years from the issuance of the bond have been paid by the maker of the bond, and there has been no correspondence or communication between the complainant or the prior holders of said State bonds with the railroad company.

III.

We will not stop now to discuss the question of whether complainant is indeed the owner of the bonds and coupons sued on, nor whether this is a champertous law suit, nor who the real parties are who are maintaining it; nor the fact that complainant—if he be the owner—bought them as a speculative venture at about one-third of their face value; but we proceed to investigate the late so-called discovery of complainant, that the *defendant* owes the amount of the bonds and coupons to him, and that he has a lien on its property to secure their payment.

As we understand the claim of complainant, it is, That, though the bonds and coupons are upon their face and by their terms the alone obligations of the State of Tennessee, yet by a sort of legal legerdemain, they are not what they seem to be; but, on the contrary, that the railroad company is the real obligor, and the State of Tennessee is merely an accommodation indorser.

That the real transaction was as follows: The State of Tennessee was in an embarrassed financial condition prior to and in 1851–2, and could not have floated any considerable debt, and out of pure accommodation agreed to become the indorser of obligations of the railroad companies to raise money to equip their roads, and that the act of February 11, 1852, under which it is claimed the bonds sued on in this cause were issued,

is in effect and in truth, though not in form, precisely as if the railroad company had executed and delivered to the bondholder its mortgage bonds, secured by a first mortgage on its railroad, and the State had indorsed said mortgage bonds—or, to quote the language of the Bill:

Record, p. 3. "The tenor of the Act which gave existence to the "bonds, was that each company became liable upon "and bound to perform the obligations contained in "and represented by the bonds loaned to it."

And again, on page 22:

Record, p. 22. "Your orator charges that under and by virtue of "the provisions of the General Internal Improvement "Law of February 11, 1852, the State of Tennessee was "only secondarily liable for the bonds loaned by "it to the Mississippi Central Railroad Company and "its successors, and that the said company was *pri-* "*marily* liable under the provisions of the said Act "for the payment of the principal and interest of said "bonds."

And again, on page 3:

Record, p. 3. "In order to insure the said sale and make a market "for said bonds, and to create confidence in the public "and on the part of persons to whom said bonds "might be offered for sale, * * * * * * * * "it was provided by said statute that," etc.

Now, before examining the Act of Febuary 11, 1852, or its history or prior or subsequent legislation or contemporaneous construction of its meaning, let us see what kind of an Act would naturally have been passed by a legislature which *intended to do* what complainant says the legislature, by the Act of February 11, 1852, did; and then see whether said Act makes such provisions as would have been made if complainant is right.

Acts 1851-2, Ch. CLI.

There are three things to be effected:

1. The primary liability of the railroad company.

2. The secondary liability of the State.

3. Said primary liability to be secured by a first mortgage lien on the property of the railroad company.

Now, what course would any body of men adopt to effect these three things? Would they not have the railroad company execute its own bonds—thus being primarily liable—and secure them by a first mortgage on its road, and have the State indorse or guarantee the payment of said mortgage bonds? This would be the natural, plain, direct way of doing what complainant claims was done by the Act of February 11, 1852. Or, if it was desired that the State should occupy the relation of joint maker or surety, would not the natural and only plain way be to have the company and State execute jointly the bonds, and have the company secure the said bonds by a mortgage? Or, if the State was to be a surety instead of indorser, would not the State have authorized the Governor in its behalf to sign said company's bonds as surety, stating the fact of suretyship?

And now let us see what kind of a bond would have been provided for if the object had been to do what complainant claims the legislature, by the Act of February 11, 1852, did.

Complainant's counsel argue and introduce reports and documents to show that Tennessee's credit was not the best, and that the chief object in the mind of the legislature, in adopting the scheme of February 11, 1852, was to make it plain that the bonds to be issued were a lien on the railroad, "in order to insure "the sale and make a market for said bonds, and to "create confidence in the public and on the part of "persons to whom said bonds might be offered for "sale," etc. Record, p. 3.

Would not a legislature with this intention have required—

1. That the bonds themselves should have been signed by the railroad company as the sole or at least the joint maker?

2. Would they not have required that the bond itself should state on its face that it was secured by a mortgage of a certain date?

3. Would there not have been stated on the face of the bond the particular railroad which was mortgaged to secure the payment of said bond to the holder, so that the bond as it passed from hand to hand would show distinctly by what road it was put into circulation, and what property was mortgaged for its payment?

4. Would not said mortgage have provided that the bondholder, in case of default in payment of coupons or bonds, should, either directly or through a trustee on his request, take charge of or sell the mortgaged estate?

5. Would not said mortgage have provided for the bondholders being heard in any action as to the appointing a receiver or selling the mortgaged property?

6. Would not said mortgage have provided that said bondholder should be heard in the distribution of the fund realized from a receivership or sale of the mortgaged property?

These things seem too plain for argument.

If, on the other hand, the State of Tennessee, without railroad communication with the markets of the world, yet with an immense territory filled with minerals—covered with valuable timber—with a climate and soil which would tempt immigration and capital; a State with taxable property in 1846 of $90,169,458 only, that by securing railroad communication could

and did increase its taxable property to $273,327,240 in a few years; a legislature whose object was to build up a system of railroads, and who knew some of them would be very valuable, and others of far less value to the *stockholders*, but all exceedingly valuable to her in developing her resources and increasing her taxable property; a legislature which intended, not as accommodation indorser, but for the benefit of the State they represented, to effect this object with the least loss and the most gain to the State—How would it have proceeded?

A State which intended to manage and control said system as her interest required, without outside interference, and be able to protect herself from fraud or loss, and to indemnify herself by summary action—What course would she have adopted?

The first thing she would naturally do would be to get her citizens to join her in building up the system as far as they were able; and then, if she had the money, use it in aiding in the completion of the line, taking such a lien on the works as would reimburse her the amount expended at some future time when the enterprise was able to do so;—or, in case she did not have the money in her treasury, to issue her own bonds, on which she alone should be bound, and sell them herself or by her agent;—or, if the company would receive said bonds as cash, and could realize their face value, to turn said bonds over to the company as so much money, taking a lien to secure herself against loss, to be managed, disposed of, increased or diminished, as she saw fit, having in view her own interest, to wit, the development of her wealth and industries.

Under such a system, in case a railroad proved profitable to the stockholder, the State would in time be reimbursed all of her advances, and the addition to her population and taxable property would be a clear gain.

In case the railroad did not prove profitable at once to the stockholders, she could further aid it, if to her interest, or release her lien, or sell her lien, or sell the road, it being a matter of comparative indifference to the State what body of men owned and controlled a railroad, if it was built and kept in active operation, developing her resources. Even in case some of the railroads should not be able to fully return to the State the advances made them, she would be more than compensated by the building and operation of such railroad; for the loss she would incur would be only the difference between the value of the whole road built and the amount she had advanced. Because, by a transfer of her lien, or a sale of the railroad to pay it off, she would sell not only that which was bought with the aid she had furnished, but also all that which the stockholders had put into the enterprise. And, as her object was to develop her resources with the least possible loss to herself, she would naturally make some provision by which she might, as exigencies arose, do such things as would effect her objects.

So that if her purpose was as defendants claim it was:

1. Instead of having the bond signed by the railroad company as the sole or joint maker, the State would execute her bonds alone.

2. Instead of having the bond state on its face that it was secured by a *mortgage* of a certain date, it would have no reference to a mortgage at all, but be based on the pledged honor of the State.

3. Instead of having the bond state on its face the *particular railroad* which was mortgaged to secure its payment, it would not mention any railroad.

4. Instead of providing that the bondholder, in case of default, should be entitled to proceed either directly

or through a trustee to impound the mortgaged estate, there would be an utter absence of any such provision.

5. Instead of providing that the bondholder should be heard in the disposition of the proceeds realized from a receivership or sale, it would have been entirely free from such a provision.

Thus we—by showing in advance what it would have been natural for Tennessee to do if she had intended to accomplish what complainant claims she did, and also by considering what she would naturally have done in case she had intended to do what defendant claims she did, and bringing these two natural courses in sharp contrast—are in a position to look at the Act of February 11, 1852, and decide by its examination whether of the two is its correct interpretation; for, unless we are greatly deceived, these test questions will decide the matter—the only thing assumed in this argument being that the members of the Tennessee legislature were reasonable creatures.

IV.

Now let us look at the general features of the Act of February 11, 1852. Act 1852, Feb. 11.

1. It provides aid for fifteen or more railroads in the same Act, crossing or running into the State in different directions, and by examining the map of Tennessee—its topographical and geological formations; its wheat, cotton, corn and tobacco lands—it will be seen that these fifteen projected roads (though some of them would probably be, and were in fact a dead loss to the stockholders) were, each of them, calculated to develop certain parts of the State, and largely increase her population and taxable property. The East Tennessee & Virginia line was designed to connect the Virginia railroads with Knoxville, the Record, pp. 308, 309.

chief city of the eastern end of the State, and as the great wealth of the country was then in the east and northeast, this road is provided for in the first section of said Act.

Next is the East Tennessee & Georgia—intended to run from Knoxville in a southwesterly direction to the Georgia line—and in this connection it will be seen that the State was looking to her own interest as to this road and not leaving it to stockholders altogether; for, by Section 11, she provides: "that "this Act shall not extend to or embrace the East "Tennessee & Georgia Railroad Company, unless "said company shall extend their road so as to form "a junction with the East Tennessee & Virginia Rail-"road at Knoxville, and in the event said company "fail or refuse to make said junction then all the "rights, powers and privileges, with the restrictions "and liabilities of this Act shall extend to ANY com-"pany which may hereafter be chartered for the pur-"pose of building a railroad to make such connection, "and in no event shall the provisions of this Act "extend to or embrace more of the East Tennessee or "Georgia Railroad than that part which lies between "Blair's Ferry and the City of Knoxville."

The next is the Chattanooga, Harrison, Georgetown & Charleston Railroad, which was to be built also in East Tennessee, running from Chattanooga north, and to the east of the Tennessee river. The next was the Nashville & Northwestern, running from Nashville to the Mississippi river at Hickman, Kentucky, in a northwesterly direction. Then the Louisville & Nashville, to run from Nashville north to Louisville, Kentucky; the Nashville & Chattanooga, to run southeast from Nashville to Chattanooga; the Nashville & Southern, to run from Nashville south to Decatur, Alabama; the Mobile & Ohio, to run through West Tennessee from Mobile, Alabama, to Columbus, Kentucky; the Memphis & Charleston, to

run east from Memphis along the southern border of the State; the Memphis, Clarksville & Louisville Railroad, to run from Memphis northeastwardly to Louisville, etc., etc.

It will also be seen, upon reading sections 15 and 19, as well as the Act as a whole, that the State did not propose to engage in the business of a purely accommodation surety or indorser, but was looking with a keen eye to her own interests—to developing her wealth and increasing her taxable property by a judicious investment; and, as her tax lists abundantly show, she was not mistaken in the idea that she could well afford to donate, if necessary, what the stockholders lacked, in order to develop her hidden wealth. §§ 15, 19. Record, pp. 293-4.

Evidently the first and controlling purpose of the State was to increase the values of the taxable property in her borders; and secondary to this was the desire to effect this purpose at the least possible cost; but to affirm that she was in these transactions a mere accommodation indorser—one who did not expect any benefit from the transactions except the complacent consciousness of having done a favor—has no support either in the Act of February 11, 1852, or the prior or subsequent history of Tennessee, as will be shown hereafter.

V.

Take another general view of the Act of February 11, 1852. Upon its examination there will not be found a single clause in the whole Act which requires that any of the fifteen railroad companies mentioned shall sign the bonds as joint obligors; nor that the name of the company shall be inserted as payee of the bond; nor that the company shall indorse the bond; nor that its name shall appear in any way in or upon the bond as maker, surety, payee, indorser or guarantor.

Again: though the Act is explicit as to the rights

and duties of the State, the railroad companies and the stockholders, and though it provides for cases where bonds are fraudulently obtained or their proceeds misapplied, for possible defaults in paying interest and sinking fund, and also the principal of the debt, there is not one single intimation, from one end of the Act to the other, of how or where or when the holder of said State bond is to be heard. Indeed the word "bondholder" is not mentioned at all.

Let us look a little further into this strange omission.

If the company is bound to the bondholder, and if the bondholder has a lien on the railroad, how is it possible that in case of default in the payment of interest, the bondholder has no voice in determining whether a receiver shall or shall not be appointed, nor any voice in the question of who is a proper person to be appointed? Further, how can the omission in said Act to provide means by which the bondholder shall be heard as to the disposition of the funds realized by a receiver be explained on complainant's theory?

It must have been known that a great deal depended on the selection of a proper person as receiver—or, for that matter, whether it was wise in a particular case to appoint one on the first default. It must have been known that a receiver had it in his power to absorb all the income in repairs, replacements, etc., or, by not using a sufficient amount for repairs, to practically destroy the value of the whole railroad. Why was it not provided that, on application of one-half or three-fourths of the bondholders, a receiver might be appointed? Why was it not provided that the bondholder might be heard as to the management of the mortgaged property by a receiver?

The same questions may be asked as to the sinking fund.

If the sinking fund was for the benefit of the bond-

holder directly, why was it not provided that it should be invested by the purchase of some of the same bonds issued to that particular company, and provision made for calling in such bonds? or why was not the sinking fund required to be invested in something else than the bonds of the State?

The State was the maker, and, upon the face of these and her other bonds, the alone debtor. Why was it expressly provided that the company should invest this sinking fund in the bonds of the State, and assign them to the Governor?

Considering the State as the creditor, and the company as the debtor, all this is plain and sensible.

But if the bondholder is the creditor to be secured, how does this sinking fund—invested as it is required to be—*put him in any better position than if so much money had been paid into the State treasury?* If the State defaults on the bonds which he holds, she will also default on the bond paid into the sinking fund. If the State pays the bond and interest which he holds, he will have no use for a sinking fund. So, in either event, this whole sinking fund provision is senseless if complainant's newly discovered theory is true.

VI.

PUT THE ACT IN PEACEABLE OPERATION.

Now let us examine a little closer into the Act. Let us put the Act into operation, and see how it works out. Let us suppose that a company has received $200,000 of the bonds of the State and has sold them, and five months and a half after said bonds are issued, it deposits in the Bank of Tennessee, as required by the 5th section of the Act, an amount sufficient to pay the interest, including exchange and necessary commissions. What is the condition of the parties? 55.

The company has done precisely what it was required to do, and, having done so, there is no claim

against it either legal or equitable; but, on the contrary, so far as the interest to become due fifteen days thereafter is concerned, whether the State or the bondholder be the creditor, the company having performed its obligation is forever discharged therefrom.

The State has the money in the hands of her fiscal agent—the Bank of Tennessee.

The holder of the Tennessee bond has not received any interest on his bond. Indeed, no interest is due on his bond, and yet the railroad company has discharged $6,000 of its debt in strict pursuance of its contract.

If the State is the creditor of the company, this result is natural and just; but if the bondholder be the creditor of the company, this necessary result of the first step in carrying out the provisions of said Act is both unnatural and unjust.

Suppose this money, after it was paid in as required by the Act, was embezzled or stolen without fault on the part of either bondholder or State or company, whose loss would it be? Certainly not that of the company; it had strictly performed its whole duty in exact compliance with the terms of its contract. Certainly not of the bondholder; he has his State bond and coupons in which the State has pledged her honor that they shall be paid on maturity, and they are not yet due, and he has never received payment thereof. The loss would unquestionably be that of the State. Why? Because she was the creditor of the company, and the company had paid the interest it owed her precisely as required by the Act.

Why would it not be the loss of the bondholder? Precisely because *he is not* the creditor of the company, but of the State alone.

NOTE: There is no provision in the Act requiring the bank to hold the money paid in by railroads as a separate fund for any special use or any particular

persons, nor is it required to pay this particular money on any specified coupons.

VII.

Let us take the next step in the practical working of this scheme—supposing now that the Act was being literally followed.

The company has been paying into the Bank of Tennessee, strictly as required, the interest due on its debt to the State for five years from the completion of its road, and now, as required by the 7th section, it purchases $2,000 of the bonds of the State of Tennessee, which were issued to build the Capitol, and it assigns said two bonds to the Governor of Tennessee, and pays them into the treasury of the State, and thereupon said State, by its Governor, gives the company a receipt. What is the condition of the parties now?

The company has done all that the Act required it to do. It has paid $2,000 in the obligations of the State, whose obligations it had used precisely in accordance with its contract. It has no further duty to perform as to these State bonds, and has therefore discharged forever $2,000 of its debt. It now owes only $198,000, instead of $200,000.

The State issued her obligations to this supposed company, and required this payment in her obligations, and so she is paid to that extent.

The bondholder holds the obligation of the State which pledges the honor of the State to pay it at maturity, which is thirty-five years thereafter.

This again shows, beyond controversy, that the State was the creditor of the company, and the bondholder had nothing to do with the company or its railroad, but was what his bond declares—a creditor of the State, depending upon the pledged honor of the State for payment of his bond at maturity.

These State bonds had forty years to run; and by the first section of the Act of February 11, 1852, could not be issued until the road was fully prepared for the iron rails, so that upon the rails being put down, it would be complete for thirty miles—and so of each succeeding section. So that if the road was only thirty miles long—or if the company, as was usual, did not receive the bonds until the whole road was about ready for the iron—the sinking fund would begin, under the 7th section, five years after the issuance of said bonds, which would be about co-temporaneous with the completion of the road—as it actually was in the case at bar.

Now, continuing our supposition that the Act of February 11, 1852, had been literally complied with, it would only require thirty-three years for the sinking fund and its accretions to have repaid the whole principal of the debt. So that by adding the five years, which elapsed before the sinking fund installments were required to be paid, to the thirty-three years in which the sinking fund and its accretions would have returned the whole of the principal, we have this result, that in thirty-eight years after the issuance of the bonds and *two years before they mature* the State of Tennessee has been paid in full, precisely as required by the Act, all of its advances.

How does this result consist with the complainant's theory?

Here, at the end of thirty-eight years—two years before the State bonds in the hands of the holder are due—the whole amount advanced by the State has been fully paid—literally and precisely in accordance with the Act of February 11, 1852.

Now, what is the condition of the parties?

1. The railroad having, in precise accordance with the terms of the Act, done all that it was required to do, is unquestionably discharged legally and equitably

from any further obligation as to the principal of the debt.

2. The State has received and invested the sinking fund in accordance with the Act until it equals its obligation to the bondholders.

3. The holder of a State bond has a bond which will not mature for two years, and he has at last only the faith of the State upon which to depend for the payment of his bond at maturity.

Thus it will be seen that in case the Act of February 11, 1852, had been fully complied with by the railroads in all its provisions, the result reached, both as to the interest and sinking fund and principal debt, makes it impossible that complainant's theory or construction of said Act can be the true one.

VIII.

We do not stop to discuss the question of whether the sinking fund began five years after the completion of the section of thirty miles, or after the completion of the whole road—or the question whether a long railroad, by completing one section after another, and not paying the sinking fund until the whole line was completed, might not delay the payment of the sinking fund to a time from which the sinking fund and its accretions would not equal the amount of the principal debt; for, in either case, it is manifest that the State is the alone creditor of the railroad company.

In order to make this plain, suppose that it was settled that upon a true construction of the Act of February 11, 1852, no sinking fund was to be paid until the whole line was completed, and that a long railroad had made great delays in completing the successive sections, so that it did not begin payment of a sinking fund for ten or fifteen years after the first State bonds were issued to it, and at the end of fifteen years from

the first issue of bonds, it paid in the State's bonds as required for a sinking fund—say Capitol bonds.

The Act, by the 7th section, declares, "The bonds "so paid in shall be a credit on the bonds issued to "the company," which, of course. means a credit on the amount of the debt due the State by the company, on our theory. But whatever its meaning be, whether it be a credit on the bonds issued to the company, or upon the amount due the State on account of the issuance thereof to the company, in either event the company is thereby discharged of one per cent. of its principal indebtedness; and so of each subsequent payment of sinking fund installments. The company has literally done and performed everything required by said Act to be done by it, so far as this one per cent. of principal indebtedness is concerned, and hence is discharged to that extent.

The State, the creditor of the company, has been paid, as the contract required, in its own obligations, this one per cent. of the principal debt.

The creditor of the State, however, holds a bond no part of the principal of which is due for twenty-five years.

In other words, the company owes now the State 99 per cent. of the original debt, while the State owes her creditor (the bondholder) the whole amount of her principal debt.

This must be so, or the Act of February 11, 1852, was a vile trap by which a railroad company was forced, under strong penalties, to pay the State, and afterward to pay the State's bondholder again! And this idea—that it was ever intended under any possible circumstances that the company should be *bound to pay the same debt* TWICE—is too preposterous for argument.

It is worthy of remark, in passing, that the payment of the interest to the State before the interest on the State's obligations was due, and the payment of the

sinking fund to the State long before her bonds were due, were not matters of discretion with the company or with the bondholder, but were required by clear and explicit directions in the Act, and a failure was to be *immediately* followed by the State's taking forcible possession of the whole railroad, and upon her so doing a political appointee of the party then in power would naturally be put in charge thereof as a receiver — an event utterly destructive of the interests of the stockholders and owners of the railroad.

IX.

Having considered the Act of February 11, 1852, under the supposition that its terms were literally complied with, and seen the results, let us now test its true construction and force by supposing that its terms were violated, and then consider the condition of each of these three parties—the company, the State, and the State bondholder—after such violations, and the rights and remedies of each, and thus get another large view of the scope and purpose of the Act.

Suppose a case where the Governor has issued, and the company received and sold on the open market, $100,000 of the bonds of the State, and that said bonds, with 40 years to mature, are in the hands of a *bona fide* and innocent holder for value, and that such bonds were so issued and received, contrary to the true intent and meaning of the Act, but without fault on the part of the stockholders of said company: what would be the condition of the parties? What remedies would they have under the Act?

This is one of the cases provided for by the 13th section of the Act; and the only remedy provided is that the Governor shall notify the attorney-general of the State, "whose duty it shall be forthwith to institute "in the name of the State a suit in the Circuit or "Chancery Court of the county of the place of busi- § 13.

"ness of said company, setting forth the facts;" and "the Court shall order, adjudge and decree that said "road lying in the State, with all the property and as- "sets of said company, or a sufficiency thereof, shall "be sold, and the proceeds paid into the *treasury;* "and it shall be the duty of the comptroller immedi- "ately to vest the same in stocks, creating a sinking "fund, as provided for in the 7th section of this "Act," etc.

It may have been greatly to the interest of the holder of said State bonds. that the railroad should not be sold until the maturity of his bond; and yet he is not consulted—indeed, there is not even a provision that a notice, either by publication or otherwise, shall be given as to the numbers of the bonds so issued and received, so that the holders might be present at the sale and protect their supposed interest. But the State, on its own motion and without regarding any other body's supposed rights, immediately begins proceedings, sells the road, say for $50,000, has the money paid into her treasury, has a title to all the railroad decreed to the purchaser, puts him into possession, and thus summarily ends the matter so far as the company is concerned.

It will hardly be contended that the purchaser does not get a good title, free from all incumbrance; and yet here, according to complainant's theory, the property is sold, the real debtor to the bondholder discharged, and the bondholder has not only not received anything, but never was even notified that the property he had a lien on was to be sold. (Of course, it is assumed in the above case that if the company was the debtor to the bondholder, and the bonds would have been a lien if regularly issued, the company could make no defense based on the irregular issue against the bondholder's rights.) Now, on complainant's theory, this result is impossible; but on the defendant's theory, it is plain and just.

X.

Suppose, however, the State had regularly issued, and the company received, the State bonds, precisely in accordance with the terms of the Act, and the company fails to pay, in accordance with section 5, the interest on its debt: what is the result? § 5.

If the railroad companies were the debtors of the bondholders, and the bonds a lien on the railroad, we would naturally expect to find that the company was required to pay to the bondholder the coupons at their *maturity*, and, on failure, a plain and adequate remedy given the bondholder to enforce his lien. But we find nothing of the kind. He is not even mentioned.

The section provides that it "shall be the *duty* of "said company to deposit in the Bank of Tennessee "at Nashville *at least fifteen* days BEFORE the in- "terest becomes due from time to time *on said bonds* "issued as aforesaid, *an amount sufficient* to pay such "interest, including exchange and necessary commis- "sions, or satisfactory evidence said interest has been "paid or provided for," etc.

On failure to pay the amount as required fifteen days before the State owes any interest to the holders of her bonds, the Governor *shall immediately* appoint a receiver to take charge of said railroad so defaulting. "Defaulting!" *to whom?* To the bondholder? No; his coupon is not due for fifteen days, and hence as to him no default could occur, even if the company were his primary or sole debtor, until maturity of his coupon. So that so far as the bondholder is concerned, neither he nor any one representing him could take any steps against the company or its property. But if you consider the State as the alone creditor of the company, and as the alone debtor to the bondholder, then the whole becomes plain and natural.

Considering the provisions of this section a little further, this becomes still plainer.

The receiver is to give bond and security to the *State*, not to the bondholder, not even to the State for the *benefit of the bondholder*, or those who may be interested in the impounded property. Nor indeed is there any provision in any part of the Act that allows any State bondholder to have any anything to do with the said State receiver, either as to who shall be appointed as such or how he shall manage the property after such appointment, or in the paying over by said receiver of the funds realized by such receivership. But on the contrary, his bond as receiver is to be payable *to the State*. He is summarily put into possession of the property by the *State*. The amount of this bond is to be fixed by the Governor of the State. The receiver is to settle his accounts from time to time with the Comptroller of the *State*, and the money realized by such receiver is to be deposited in the TREASURY of *the State:* NOT *as a separate fund*, subject to the order or the call of the holders of the coupons, nor to be held exclusively and as a *separate fund for them;* but said "BALANCES" are to be paid *generally into the treasury of the State*. And it is made the duty of the Comptroller to draw on the treasury for any sum of money to meet the interest on such bonds as the company has not paid in an amount sufficient for "as provided in this Act," which is the same as saying that in case the company fails to deposit a *sum sufficient*, etc., to pay such interest fifteen days before the State's coupons are due, then the Comptroller shall draw on the treasury of the State for such amount.

It is true that the receiver is required to pay over the income under the directions of the Governor; but this can not mean to the bondholder, for it is immediately provided that he shall settle from time to time with the Comptroller, and deposit the balances in the treasury of the State, and *whenever* said receiver shall realize a *sufficient sum* "exclusive of costs and ex-"penses incident to said proceedings to pay off and

"discharge the interest" on said bonds, etc., the receiver "shall surrender the road and equipment to the company."

If the amount realized by the receiver were to be paid by him to the bondholder there would have been some means adopted by which the bonds could be identified, and also some provision that the receipt of the bondholder or production of the coupon by the receiver should be a good voucher in his settlements with the Comptroller. There is nothing of this kind; but he is expressly required to deposit the balances from time to time in the *State treasury*.

Besides, the State did not contemplate defaulting on her coupons; indeed, she makes express provision in this section for their payment, even though all the railroad companies should default in paying to the State what the Act required; and it must have been known that the selection and appointment of a receiver—the getting up his sureties and execution of his bond—the taking possession and operating a railroad—could not in fifteen days have realized an amount which the company, with the terror of a seizure of its property by a political appointee, had been unable to raise; so that it must have been known (as it actually afterward turned out in each case) that the receiver was not able in fifteen days to get an amount sufficient to pay the interest.

Looking at this section from a general view, is it not inexplicable (if indeed the company was the real debtor of the bondholder) that it was not provided that the bondholder might be heard as to the appointment of a receiver—the sufficiency of his bond—the way in which he should manage the impounded property, or distribute the funds realized? Again, would it not have been the natural and proper thing to have provided that the bondholder should be heard? for by complainant's theory the railroad was not only bound for the interest, but also for the *principal* of the State

bonds to the bondholder, so that there were much larger interests involved than the mere getting of one installment of interest, which might be done by neglecting the property and paying all the income to the interest account, and thus run down the road until it was worthless.

Here, then, according to complainant's theory, we have the railroad company—the only real, or at least the principal, debtor to the bondholder—defaulting in payment of interest to his creditor, the bondholder; and yet the bondholder, though he has a lien on the railroad, has no more voice in what shall be done, or how or by whom, than if he had no claim on the railroad. He can not object to the appointment of a political receiver who knows nothing of the management of a railroad, he can not be heard in fixing the amount of the receiver's bond, nor see that his sureties are good for its penalty, nor restrain him from putting all the income in improvements or replacements of the railroad; nor have any remedy against said receiver or his sureties for misfeasance, malfeasance or nonfeasance in office; nor have any voice in the distribution of the fund realized by the receivership. Indeed, there is no point at which he has any right under said Act to be heard at all—though the estate securing his bonds has been seized, and is being used.

This seems to be passing strange!

Suppose, however, the receiver does realize $100,000 from the operation of the road above costs and expenses, and that the interest due is precisely that amount. The receiver settles with the comptroller, and "deposits" the balance "in the treasury of the State," precisely as he is required to do. He is then required to surrender the road and fixtures to the company.

Now the State has in its treasury the $100,000, the bondholder is not paid, and yet the receivership is discharged. Does not the payment of the past due cou-

pons to the bondholder at last depend, as his bond says it does, on the *faith and honor of the State?*

It must be so; or, after the State has by force collected the $100,000, the State bondholder can, by some means, compel the company to pay it over again.

XI.

Let us, however, though a little out of the order of this argument, turn from this supposed case, and state the real case at bar as to this point.

The comptroller says in his deposition (Ans. 4) that between December 11, 1876, and April 11, 1877, the State's receiver of the defendant's railroad paid into the treasury of the State, balances amounting to $110,000. It is also shown that the State has not paid one cent of said $110,000 to the holders of her bonds.

J. L. Gaines Deposition, Ans. 4, Record, p. 236. Record, pp. 313-14

Now the question is, "What right or remedy has the bondholder for his unpaid coupons?"

"Can he put another receiver in charge of the railroad and collect this $110,000 over again?"

The complainant says, on page 17 of his Bill in this cause, that he is the owner of six bonds which will not be due for many years, issued to the defendant railroad, and that each of said bonds has attached thereto seven past due coupons—each coupon for $30. So that he held $1,260 worth of coupons due at the time of the filing of his Bill—if said Bill is true. Or, if the deposition of complainant is true that he holds ten bonds, none of which are yet due, all the past due coupons thereon upon which this suit is alone founded amount only to about $3,000.

Complainant's Bill, p. 17. Record, p. 17.

So that the question which we have been discussing is actually presented in this case, and amounts to this—

Unless complainant has the right to have the defendant's railroad again seized and compel the payment over again of this $110,000, or so much thereof

as is required, which the State has already by force collected under section 5 of the Act of February 11, 1852, then this suit must end.

The complainant in his Bill says his past due coupons begin "with the installment that fell due on the "1st of January, 1876, and including the installment "of the 1st of January, 1879." *No other bondholder appears.*

Record. pp. 286, 313-14.

Now the State appointed its receiver of defendant's road, and the State took possession thereof on the 25th of February, 1876, and collected $110,000, above costs and expenses, which was paid into the treasury of the State. So that unless the road is bound to pay said interest twice, this suit must fail.

There is no escape from this.

J. D. Porter's Deposition, Record, p. 336.

The Governor, in his message of January 1, 1877, (see his printed deposition, page 34), says: "The "Mississippi Central Railroad failed to pay the semi-"annual interest due July 1, 1875, and 1st of January, "1876. On the 25th of February, 1876, I appointed "R. P. Neely, of the county of Hardeman, receiver, "and under my directions he took immediate posses-"sion of the road, and has been operating it in the "interests of the State. Since this road has been in "the hands of a receiver, it has been kept in good "repair, its running expenses paid, and the sum of "$60,000 paid into the treasury of the State on account "of taxes and *interest*."

So that the first failure of defendant to pay to the State an amount sufficient to pay said interest was July 1, 1875, and the next, January, 1876.

Record, p. 17.

Complainant's first unpaid coupons, as shown by his Bill, are those of January, 1876, and the Governor in his message says that the State's receiver had, prior to January 1st, 1877, paid in $60,000 on account of taxes and said *interest*—and now complainant says that the railroad must pay him said interest maturing

1st of January, 1876; and here is the cream of this case on this point.

Now admitting, for the sake of the argument, that complainant is the owner of the coupons sued on; that he bought them in due course of trade, paying dollar for dollar for them before due; that he had been guilty of no *laches*, and was not estopped by any act of his from asserting his full rights (all of which we deny), will he be given the aid of this Court to appoint a receiver, and take charge of this railroad and collect again the amount of this coupon for interest maturing January 1, 876?

Supposing the Act of February 11, 1852, gave a lien to the bondholder, and that these bonds were issued under said Act, and that they were issued to the Mississippi Central Railroad Company, and were sold by them to complainant for full value, and the proceeds were applied as required by the Act (all of which we deny), did not complainant as well as said company assent to the provisions of said Act as to what should be done in case of default in the interest? Did he not assent to section 5 of said Act—that the Governor should appoint a receiver—that the receiver should collect the rents, profits, etc., and settle with the comptroller, and pay the balance into the State treasury—and, when an amount sufficient had been paid to equal the amount of interest due, that the railroad should be surrendered to the company? Was not everything done in precise accordance with that Act, so far as the company and its property are concerned?

And, now, if the State declines to pay complainant his past due coupons, but holds the money, shall complainant's remedy be against the company and its property?

It is an absurdity so patent that argument against it is an insult to intelligence. And yet, unless it can be maintained, this suit necessarily fails.

XII.

Returning to the line of this argument, let us see what would be the condition of the parties if the company failed to comply with the provisions of the 7th section as to the sinking fund.

Act 1852, Feb. 11, § 7.

The company was, at the end of five years after the completion of the road, required "to set apart one per "centum per annum on the amount of bonds issued to "the company, and shall use the same in the purchase "of bonds of the State of Tennessee, which bonds the "company shall PAY into the treasury of the State "after assigning them to the Governor, and for which "the Governor shall give said company a receipt, and, "as between the State and said company, the bonds so "paid in shall be a credit on the bonds issued to the "company," etc.

Supposing the company failed or refused to do it, what was the result?

The State takes possession summarily of the whole railroad and superstructure by ordering the sheriff in each county to seize the road, and putting a receiver in possession of it. The bondholder was in no way consulted, nor was there any provision for his appearance; on the contrary, he was left as his bond left him, with no dependence except upon the pledged faith and honor of the State.

Act 1856, Feb. 21. Record, p. 611.

Or the State may have proceeded in this case under the Act of February 21, 1856, which was passed and in force before it is pretended by complainant that any State bonds were issued to defendant.

This act provides by section 5 that two per cent. per annum sinking fund should be paid into the treasury of the State, and on failure to pay, the State, as provided in the 6th section of the Act of February 11, 1852, was authorized to file a bill, and have all of said road and appurtenances sold.

Now, suppose the railroad was sold under this act

five years after its completion, and at least thirty years before the bonds of the State matured.

Is there any provision for the bondholder to be heard? Here is a case in which the State files a bill to *enforce the mortgage lien* reserved in the act of February 11, 1852, and she does enforce it by a decree of court, selling all the mortgaged property, and decreeing a title thereto to the purchaser without providing any means by which the State bondholder is to appear in said cause, or be heard in its inception or progress or in the disposition of the purchase money—indeed, whose bonds are not due for 30 years. How is it possible to affirm that this bondholder is the creditor of the railroad company, and has a mortgage lien on its property, when, by the very contract under which he claims, the whole mortgage estate is legally disposed of by a Court, under the terms of said contract, 30 years before the maturity of his bonds, without so much as calling his attention to it, or making any provision for his intervention?

So we find in the 6th section a provision for the only other possible case of loss to the State—to wit, where the sinking fund has not amounted to the sum of the original principal at the time of the maturity of the bonds, and the only result therein provided for is to indemnify the *State* of Tennessee against loss on account of the issuance of said bonds, and the means of reaching such result—to wit, a suit by the *State* against the company, in which the Court is to order "the said railroad to be placed in the hands of a receiver," or order the sale of the said road, etc., or in such other manner as the Court may deem best "*for the interest of the State.*"

Even in this last provision neither is the bondholder mentioned, nor is the Court to look to his interests, but, by the very terms of the act, is required to make such orders as shall be for the interest of the *State.*

It will thus be seen that whether the company com-

plied with the terms of the Act of February 11, 1852, or failed to comply with them, and the statutory mortgage was enforced according to the terms of the Act, *in neither case was the bondholder nor his interest consulted.* Nor was there any provision for his *intervention;* but in both cases, whether the company paid in the interest and sinking fund, as required by the Act, or whether the railroad was, by the legal enforcement of the mortgage under the terms of the Act, seized by the State's receiver or sold by a Court. *the bondholder had in no possible event any other right or claim than is written in his bond*—THE FAITH AND HONOR OF THE STATE.

If the company complied strictly with the 5th section by "depositing in the Bank of Tennessee at Nashville an amount sufficient to pay such interest," the bondholder had nothing but the faith and honor of the State as an assurance that his coupon due 15 days afterward would be paid.

If the company failed to pay in such interest, the bondholder had still only the faith and honor of the State to make certain the payment of his coupons.

If the company strictly complied with the 7th section, and also the 5th section of the Act of February 21, 1856, by which the whole principal of the debt would have been paid into the treasury of the State long before the bonds were due, the bondholder would have to rely upon the faith and honor of the State to pay his bond at maturity.

If the company failed to pay the sinking fund, the State collected it by its receiver, or by a sale of the road, and placed the funds in the treasury of the State, and in this case, as well as every other supposable case under said Act, the bondholder had no connection with the company; but must rely then, as he did when he received the bond, on the obligations of the State, as stated in his bond, "for the performance of all which

"the faith of the State of Tennessee is hereby irrevo- Record, p. 608.
"cably pledged."

There is no conflict between the terms of the bond and the terms of the Act; but there is in both the bond and the Act an utter negation and ignoring of this newly discovered claim of any rights or remedy of the bondholder against the company or its property.

XIII.

We have purposely avoided cumbering this argument with the etymology or metonymy of particular words and expressions, separated from the body of the Act and its evident purpose. Such questions as to whether the word "constitute" means "to be" or to "create"; to "pay the bonds," to pay the bonds "as provided in this Act"; nor whether the expression that "the State of Tennessee shall be invested "with a lien * * * for the payment of said bonds "issued to the company, *as provided in this Act*, "and for the interest accruing on said bonds," might not have the words "as provided in this Act" divorced from the rest of the sentence, and then discuss whether "payment of the bonds" meant payment of the amount of the bonds, or whether it necessarily meant payment to the bondholder individually; to "deposit" or to "pay in"; nor even the important question of whether, when the Act says the bonds "shall be used for no other purpose than * * * * "for putting down the rails," etc., it meant the rails were to be put on the bonds as a cushion, or the bonds on the rails as the track was laid to prevent the rolling stock from wearing; but leaving all these nice distinctions and hypercritical discussions, we have taken a broad, practical view of the Act:

1. By showing what kind of an Act a legislature, with ordinary common sense, would have adopted if

their purpose had been to do what complainant claims they did.

2. What kind of a bond would have been issued if they had such a purpose.

3. The appalling want of any such provisions in the Act.

4. We then supposed a case of a company complying strictly with every provision of the Act, and found there was no place where it had any connection or business with the bondholder, either as to interest or sinking fund, but that its relations were alone with the State.

5. We then tested the Act by a case where we supposed the company had obtained the bonds contrary to the provisions of the Act, and saw the mortgage lien enforced without the presence or knowledge of the bondholder.

6. And then a case in which the company failed to pay into the Bank of Tennessee an amount sufficient to meet the interest.

7. And where the company refused to pay the sinking fund.

Record, pp. 282, 286, 313, 314.

8. We have shown that the State, before this suit was brought, by seizing defendant's road, has actually collected the interest for which complainant is now suing defendant, and paid it into the State treasury, as provided in the Act.

In other words, tested the Act by its peaceable and then by its forcible execution. And the inevitable result in all these processes was to leave the bondholder where he began, with a bond of the State of Tennessee alone, depending for its payment on her "irrevocably pledged" faith.

These results, to our mind, are worth more than all the very learned discussions of metonymists and etymologists.

It is an easy matter to befog the mind by studying the separate parts of a locomotive engine. None, perhaps, but the gifted could get even an indistinct idea of its uses; but put it in motion, and the most ordinary person can at once see its purpose and uses. And so with this Act, *put it in operation, and the purpose is plain.*

XIV.

It will be seen that there is one very important section of the Act of February 11, 1852, which we have not noticed, to wit, the twelfth section, which expressly reserves the right of the State of Tennessee to enact thereafter all such laws as may be deemed necessary to protect the interests of the State, saving alone the vested rights of the *stockholders* of the company, and not the bondholders of the State.

The discussion of this section will be reserved for another part of this argument.

We have thus far treated the Act of February 11, 1852, as if it was the first and last—the only Act establishing the internal improvement system of Tennessee.

Let us now make a practical examination of the prior history of said State as to this subject, and see whether there were any other steps taken toward building up this system, the condition of the State and the object sought, the different plans adopted, their modification, retention or abandonment, and thus obtain such light as may be gotten as to the proper construction of the Act of February 11, 1852.

Surrounding circumstances, the existing condition of things, the evils to be remedied and the objects to be obtained, may all be considered in the construction of statutes.

10 Wisconsin R., 136.

In construing statutes we must look to the old law, the mischief and the remedy.

Dixon vs. Doe, 1 Smedes & Marshall's Miss. R., 70 ; 8 do., 151.

The several statutes on the same subject-matter are to be taken and considered together, and compared as being parts of one system, and this rule applies though some of the statutes have expired or been repealed, or are not referred to in the others.

Ibid.
3 Mass. R., 17.
8 Mass. R., 418.
1 Pick. R., 248.
2 Bailey, R. (S. C.) 541 ; id., 554.
Cooke (Tenn.), 258.
6 Bart. (N. Y.), 60.
17 Vermont R., 479.
1 Wheaton, 115.

XV.

The earliest settlements in this State were made in about 1770. It was included in the territory of North Carolina until 1790, when it was placed under a separate territorial government, under the name of "The Territory south of the Ohio River," and in 1796 it was admitted as a State into the Union, its capital being Knoxville, and its population almost exclusively in the extreme eastern part of the State.

The State is far in the interior of the United States, and was almost cut off from any communication with the northeast and east where the population and markets were located, by its long distance and the intervention of ranges of rugged mountains. The fertility of its soil, the wealth of its mines, the value of its timber, only needed a system of internal improvement by which they might be developed and made available by easy access to markets, and the

speedy result would be the populating of its 50,000 square miles of territory and the development of its natural wealth.

"How was this to be done?"

This was the leading question with her statesmen and people. As early as the year 1829, Governor Carroll, in his annual message to the legislature of Tennessee, discusses the subject as follows: Senate Journal of Tenn., 1829, pp. 126-7.

"In many parts of our country the great work of "internal improvement is advancing with astonishing "rapidity. The New York canal is in successful ope- "ration, conveying the products of a vast region of "fertile country to a ready and certain market, and "the Pennsylvania canal, four hundred miles long, "furnishing an inland water conveyance to that great "State, is nearly finished. The Baltimore railroad, "the Chesapeake and Ohio canal, the canal uniting "the water of Lake Erie with that of the River Ohio, "and numerous other improvements of less magni- "tude but of great value to the internal trade of the "country, are in a state of vigorous progression, and "will in a few years be entirely completed. With "these bright examples before us does it become Ten- "nessee to be idle? Our rivers afford numerous out- "lets to market, and when it is considered that the "sum required for the removal of all obstructions to "navigation in the principal ones would be soon repaid "by savings in transportation, it is reasonable to hope "that a measure having in view that object, would, at "no distant day, meet with undivided support. But "as our means may not justify the immediate com- "mencement of such an undertaking, I would respect- "fully recommend the employment of some skillful "engineer to explore our largest rivers with a view of "ascertaining, with all reasonable certainty, the "amount of probable expense which would be "incurred at each point of operation.

"I would also suggest the propriety of incorporat-

"ing companies for the construction of turnpike roads "and bridges, under such restrictions and extending "to them such rights as are approved by the wisdom "and experience of those States where similar com- "panies have long existed. It is scarcely necessary "to remark that our roads in the winter season are "almost impassable, and yet we have stone in greater "abundance and more convenient for the construction "of roads than any other State in the Union. If a "commencement were once made so as to afford our "citizens an opportunity of perceiving the value of "such improvements, all opposition to them would "unquestionably cease. The farmer would discover "that he could bring double the quantity of produce "to market over a good road than he now can over a "bad one, and in half the time, without injury to his "horses or wagon, and the payment of toll under "such circumstances would be indeed great economy. "An improvement in the condition of our roads is "so well calculated to promote agriculture, facilitate "commerce, and advance the growing prosperity of "our State, that I have peculiar pleasure in recom- "mending the measure now proposed for your delib- "erate consideration."

And thereupon a committee was appointed by both the houses of the legislature to inquire into and report what and how such system should be inaugurated. The committee, among other things, report a bill establishing a board of internal improvements, and say:

Senate Journal, 1829, p. 359.

"The committee look up with pleasure and hope to "the great and useful plans of internal improvement "of our sister States; they rely on their successful "schemes of industry and improvement as a sufficient "incentive to animate and urge to action the long "languishing energies of the people of Tennessee. "They do not cast any imputation on the people of "former legislatures, as they are advised of the

"crippled condition of the finances of the State; "but they believe that further delay will be ruinous "to the farming, commercial and manufacturing in- "terests of the State.

"The committee feel the deep importance of putting "into speedy operation some general plan of internal "improvement for each division of the State. They "believe the bill reported in its equal and general "character is perhaps the best they could devise to "insure the aid and support of their countrymen, "and that it is well calculated, as they believe, "to harmonize the supposed conflict of interest be- "tween the three marked divisions of the State. They "recommend the proposed system for the improve- "ment of the navigation of the many rivers of the "State, with the hope and belief that the value and "utility proceeding from a skillful application of the "small sum of $150,000 (one hundred and fifty thou- "sand dollars), will lead onward the march to wealth "and prosperity, and keep active and urgent in the "cause, the energies and services of the people of "Tennessee."

XVI.

The legislature of 1829 did adopt a system of internal improvements, by chapter 75 of the Acts of that year, which, for convenience, we will call the

Direct, or Money Plan.

It was a plan in which the State furnished the money, so much to be used in East, Middle and West Tennessee, and by virtue of said Act incorporated a body to be known as the "President and Directors of the Board of Internal Improvement," to consist of six members, who were to be elected by the legislature, two from each grand division of the State, who were to ascertain what improvements were most needful, have surveys and estimates thereof made,

Acts 1829, Ch. LXXV.

and report to each session of the legislature "the "state of the funds that *have or may be appropriated* "for internal improvements, the surveys, plans and "estimates that have been made, and the expense or "cost of each."

This plan, while it demonstrated that the State so far from regarding this as a matter in which it had no direct interest, on the contrary, shows that the building up of the system was of such immense importance to the State, *as a State*, that it was deemed to its interest to pay the whole amount necessary to inaugurate the system rather than fail to establish it; and this settled conviction on the part of the State, whether controlled by one political party or another, is manifest in all her subsequent efforts to build up and maintain her internal improvement system. For while it will be observed, as we progress with these efforts of the State, that she is disposed to get the system established upon as good terms as she can, yet it will be seen that she never considered that she was merely a *benevolent accommodator*, but, on the contrary, that she was to be so much benefited as *a State* that she would not allow the system to halt, much less fail, even if she had to do as much or more than private enterprise in building up the system.

The direct plan of 1829 soon met with two obstacles in the way of its successful operation. One was, that local jealousies were excited, one division or county insisting that the commissioners appointed by the legislature did not fairly distribute the fund among the different localities. The legislature of 1831 attempted to overcome this popular cry by distributing the fund to the several counties and appointing a board of commissioners for each county, etc. This, of course, spread the appropriation over so much ground, and into so many hands, that no concert of action or concentration of means could be

See Acts 1831, Ch. XLI, XLIII, XLIV, XLV, XLVI.

had, so that it could not produce the result intended. But it made one thing manifest, and that was, that the State, in order to succeed in building up her internal improvements, must in some way combine with a private corporation.

Another difficulty was, that the State, though satisfied it was to her interest as a State to pay the whole sum necessary to establish the system, did not have a sufficient amount of money to do this. How was this difficulty to be surmounted? The Governor in his message says:

"A very laudable spirit prevails throughout the "State in favor of internal improvements; but this "object can not be accomplished without the aid of "money. Sound policy would therefore seem to dic- "tate the propriety of collecting the funds of the "bank as speedily as possible, and applying a por- "tion of them, at least, in the construction of roads "and improving the navigation of our rivers. There "is no State in the Union where the materials for "making roads are in greater abundance, and yet at "that season of the year when the produce of the "country is brought to market our present roads are "almost impassable. With a view to their improve- "ment, I would recommend the propriety of incorpo- "rating companies, imposing such restrictions and "extending to them such privileges as are approved by "the experience of other States where such companies "have long existed; and, for the purpose of encourag- "ing that kind of associations, the State should be au- "thorized to subscribe one-half, or at least one-third, of "the stock. This plan has been successfully pursued "in Pennsylvania for the last fifteen years, and the "extent of her improvements during that time has "been without example in the history of any country "in proportion to the population. Good roads and "the certain navigation of our rivers have such an "important bearing upon agriculture, commerce, and

"the growing prosperity of our State, that I can not "but earnestly recommend to your attention the pro- "priety of adopting such a system of internal im- "provements as we can certainly achieve by our own "resources."

Here is the first suggestion of incorporating private enterprise to assist in building up her internal improvement system, and the first proposition to try the stock plan, the Governor recommending that the State take one-half, or at least one-third, of the stock, and grant the private company certain privileges.

The legislative committee on internal improvements make suggestions, in their very able report, of how more money may be raised by the State to invest in this system: 1st, By calling in the assets of the State bank; 2d, By using the school fund; and 3rd, They say that they do not doubt that the State could on its faith negotiate a loan at a reasonable interest, and thus raise money, but recommend only the first two modes.

Senate Journal, 1831, pp. 128-132.

The legislature adopted these suggestions, and so used the assets of the bank and the school fund, as well as funds derived from the sale of lands; but with all its efforts this "direct plan," for many reasons, was not adequate to effect the State's purposes, the chief reason being that the State did not have enough money to establish and carry on the system, though its legislators never hesitated in the belief that it would be a wise expenditure by the State if she had the funds.

The State had also learned by experience another thing, viz., that the maintenance of efficient internal improvements could be more certainly effected by enlisting private capital and private enterprise in them, and having them subject, in a large measure, to private control.

Constitution 1834, Art. 11, § 9.

The Constitutional Convention met in 1834, and enjoined on the legislature to encourage a system of

internal improvements, 1st, Because it would develop the resources of the *State;* and 2d, Because it would promote the happiness and prosperity of her citizens.

XVII.

In 1835, having exhausted this "direct, or *money* plan," the State, by chapter 22, of the Acts of 1835–6, adopts a new plan of building up a system of internal improvements, which we will call, for convenience, Acts 1835-6, Ch. XXII.

The Stock Plan.

The leading features of this Act were the incorporation of joint stock companies to build railroads and macadamized turnpikes, and when any one of them secured a subscription of two-thirds of the capital stock, and if such two-thirds was, in the opinion of the Governor, Comptroller, Treasurer and Secretary of State, well secured, the State would subscribe the remaining one-third, and the State, in payment of her one-third of the stock, would issue her bonds payable "*to the president and directors* of such companies and their assignees," with semi-annual interest, payable at the office of the treasurer of Tennessee, "provided the company shall agree and stipulate to "pay the interest semi-annually, as the same shall "accrue and be payable," to be deducted out of the dividends due the State on its stock, etc. The State was to have the right to appoint one-third of the directors.

This was the first general Act under "the stock plan," and does not seem to have been generally accepted or acted on by private enterprise, for the reason that the proportion of the expense and risk to be borne by the State in these joint enterprises was too small.

It will repay the trouble to read the messages of Governor Cannon on the subject of this internal im- Senate Journal, 1835, pp. 36, 349.

provement system, as to what had been done, and what was expected to be done by and for the State in this matter, dated October 15, 1835, and January 25, 1836.

Acts of 1831, p. 137.

The State legislature, in 1831, had passed a joint resolution protesting against Federal aid in the internal improvements of the State; but the pressure is so great in 1835 that the State memorializes the Federal

Senate Journal, 1835, p. 117.

Government for aid; and the Governor recommends the use of all Tennessee's share in the sales of lands by the United States to be used for this end.

Acts, Extra Sess., 1836, p. 23.

On the 3d of October, 1836, Governor Cannon called an extra session of the legislature for certain purposes, first among which is the recommendation to make an appropriation to defray "the expense of making the "necessary examination and surveys in order to ascer- "tain the most eligible route through our State for the "contemplated Louisville, Cincinnati & Charleston "Railroad," and urges this as a "grand enterprise," appealing strongly "to our State pride," etc., and by chapter 4 of the Acts of the Extra Session of 1836 certain sums were appropriated for such purpose; and the Governor, Comptroller and Secretary of State

Acts, Extra Sess., 1836, Ch. IV.

were authorized and directed to employ *for the State* one principal and not more than two assistant engineers to make surveys of any railroad or macadamized turnpike in which the State should be interested, and requiring a survey of a line of railroad across the State from the Mississippi river to the Virginia line, as near the centre of the State as practicable, and report to the next legislature.

Senate Journal, 1837-8, p. 532.

At this time the value of all property in the State was estimated at $72,992,259. The State of Tennessee about this time, in its search for the best mode of establishing and maintaining an effective system of internal improvements and a common school system—the two great objects of her statesmen—had by many Acts of the legislature turned over to internal im-

provement companies portions of her school fund, requiring such companies to pay a certain interest on the amount so invested for the benefit of schools, and had also put the assets of the old bank to the same use; and finding these, together with all the surplus cash she had, insufficient, she now turns her attention to the question whether she can not, by the establishment of banks or giving banking privileges to railroad companies, assist in accomplishing the desired end.

A scheme was accordingly discussed by the legislature of 1837-8, in the message of the Governor, page 12, and report of select committee, page 64, of the *Senate Journal* of that year, and was embodied in an Act on Dec. 5, 1837, conferring banking privileges on a railroad—a scheme in which several other States were to and did join. This Act only related to one railroad; but a Bill was introduced, entitled "An Act to establish a State bank—*to raise a fund for internal improvements*, and to aid in the establishment of a system of education." It was referred to a committee, who, in their report, discuss the whole subject, and show the precise object of the establishment of the bank and its relations to the State. They thoroughly disapprove of establishing "a bank merely for the purpose of banking," but approve of it if it is made "*a mere fiscal agent of the State*, first to relieve the "pressure of the country, and then be used in the "creation of works of *internal* improvement beneficial "to the State," and as the Bill is intended to accomplish this object, they recommend its passage. Particular attention is called to this able report, as the question of the relation of the State to its bank has been raised in these cases, and also because it shows that the State, for *its own benefit*, was determined to establish a system of internal improvement; and as it failed in one direction, would begin in another.

Senate Journal, 1837-8, pp. 12, 64.

Act of 1837-8, Ch. VI.

Senate Journal, 1837-8, p. 614.

The Bill recommended became a law. It will be observed, in reading these proceedings of 1837-8, that

Acts 1837-8, Ch. CVII, CVIII.

the legislature supposed the facilities afforded by this banking of the State would enable her to carry on all needed internal improvements, dealing with each in such a way as to insure its establishment, and it will be seen by the fifteen Acts passed at that session on this subject, that some of the internal improvements were aided on the "direct money plan"—others on the "stock plan"—and the State realizing that the stock plan, begun by Acts of 1835, was not likely to rapidly succeed unless the State increased her subscription of stock; and realizing also the immense interest of the State, as a State, in the success of the improvements, she, by chapters 107 and 108, enlarged her subscription from one-third to one-half of all the stock in railroads and turnpikes, and issued her bonds to pay such subscriptions, which bonds were to be disposed of by the bank, or, in certain cases, were to be turned over to the companies, provided they would receive them at par.

Acts 1837-8, Ch. CVII, §§ 24, 26.

The interest on the bonds was to be paid through the bank. By section 24 the State retains a lien on the entire works of the companies respectively for the amount paid each by the State; and by section 26 the profits arising from the State's stocks should "*constitute a fund*," *to redeem* the bonds issued to the companies and the bank—of which latter the State was the *alone stockholder*.

It soon became apparent that the *partnership* between the State and other persons was troublesome, unsafe and unwise. The private parties who managed the enterprises, it seems, in some instances, got up "straw subscriptions," or, at least, subscriptions that were not solvent; so that the State, though nominally taking only one-half the stock, being good for her half, was in danger of advancing more than her share. Again, many schemes were put on foot to which the State subscribed which were found impracticable, or that would cost quadruple the amount which the orig-

inators represented that it would. But the chief difficulty in "the stock plan" seems to have been that the State had no sufficient means to guard her interest; for, while the corporators were familiar with every detail of expenditure and income, as well as with the present and future value of the enterprise as an investment, the State was well nigh totally ignorant. The corporators had charge of the enterprise, and, as usual in such cases, if any loss were to occur, the public and not the individual would be apt to bear the larger part of it. And, as the scheme required the State to take part in any and all stock companies, whether eminently necessary to develop the State or not, it was soon discovered this loose plan would not effect the greatest good with the least risk to the State in establishing the internal improvement system. It had also, it seems, become a matter of general belief that the State was by frauds, as to obtaining its bonds and otherwise, prevented from having this stock plan fairly tested. Accordingly, by the first chapter of the Acts of 1839–40, section 1, *all Acts*, which authorized the Governor to subscribe for stock in behalf of the State in any company incorporated or to be incorporated for the purpose of constructing any works of internal improvement, were at once *repealed*. The Act then proceeds to provide, as far as possible, for the dissolution of the partnership of the State and companies already existing— Acts 1839–40, Ch. I.

(*a*) Where the State had subscribed for stock, but had issued no bonds in payment thereof;

(*b*) Where part of the bonds had been issued;

(*c*) Where all the bonds had been issued.

Provision is also made for cases where "the com-
"pany is willing to release the State from its sub-
"scription or *copartnership*," that the Governor may

"dissolve such *copartnership*" on certain conditions, etc.

Acts 1839-40, Ch. CI.

Yet by chapter 101, the State is authorized to take more stock in the Lagrange & Memphis Railroad, and issue bonds therefor, the whole amount not to exceed $250,000.

The legislature of 1841-2 required the companies to make certain reports, and the Acts of 1843-4, Ch. 208, required certain settlements with these companies, and provided that all moneys in the State treasury not otherwise appropriated shall be used by the Governor in the purchase of bonds of the State. By Ch. 226, a committee was appointed, with powers of unrestricted access to books, papers and correspondence of companies, and it was made their duty to report:

Acts 1843-4, Ch. CCXXVI.

"1. The actual cost of the roads in which the "State owned stock.

"2. The amount paid in by individual stock-"holders, and amount paid in by the State.

"3. The whole amount of revenue collected from "each road, and how the same has been appropriated.

"4. What companies have been organized and "drawn bonds, and the amount drawn by each.

"5. What progress has been made in the con-"struction of said roads.

"6. What amount and to what companies issued "since the Act of January 25, 1840.

"And further to *inquire* into the *defects* and sug-"gest such amendments to the laws now in force as "will hereafter insure justice to the State and a "proper accountability of the companies."

The committee was allowed 120 days to inquire into these matters.

By chapters 23 and 24 of the Acts of 1845–6, a commissioner was appointed to compromise and settle with internal improvement companies, and certain suits were to be instituted on failure of settlement, and a joint resolution was adopted, reciting that, "Whereas, after applying the surplus dividends of "the bank and the contingent fund, and the uninvested "dividends declared on the stock owned by the State "in the several internal improvement companies, there "remains a large deficiency in liquidating the interest "on the State bonds issued for internal improve-"ments"; therefore it was resolved, that the Governor notify the defaulting companies, and on their failure to settle, the attorney-general should bring a test suit.

Acts 1845-6, Ch. XXIII, XXIV.

Vide p. 345.

XVIII.

The State had now tried the "direct, or money plan," and then the "stock plan," and had brought into existence its bank to aid in establishing an effectual system, but had failed in her object; indeed, the taxable property of the State, which in 1836 was $72,992,259, was, ten years afterward, in 1846, but $73,003,529, an increase of only $11,270. She now turns her attention to devising some other plan, and by chapter 169 of the Acts of 1847–8, she begins a new scheme, which, for convenience, we will call

The Indorsement Plan.

In this the first Act under the "indorsement plan," the State, in addition to the stock which she had previously taken in the Nashville & Chattanooga Railroad and in the East Tennessee & Georgia (which latter company had been formerly known as the Hiawassee Railroad), finding that these two railroads, which the State deemed so important to her, were not—even though they had theretofore received State aid—able to complete the roads, now authorizes the Governor,

Acts 1847-8, Ch. CLXIX.

in the name and on behalf of the State, to indorse and guarantee the bonds of the two roads—the one to the amount of $500,000 and the other to the amount of $350,000. Under this indorsement plan the two railroads issued their mortgage bonds, which the State, on the completion of each forty miles of railroad, indorsed and guaranteed to the amount above stated, and the board of internal improvements was authorized and required to take a lien on the whole stock of the company and on the road and fixtures as built and put in operation.

Here was precisely the plan, put in plain, direct language, which complainant insists was indirectly done in the Act of February 11, 1852:

I. The company was primarily liable.

II. The bonds were secured by a first mortgage lien on the property of the company.

III. The State was the indorser and guarantor of said bonds.

Now, if the State really intended, as complainant claims she did in the Act of February 11, 1852, to have the railroad companies really the primary debtors, and the State the indorser, and the bonds representing the debt secured by a lien on the particular railroad to which they were issued: why did she not continue the scheme of 1847–8?

The Acts of 1847–8 were plain, direct, explicit. What possible reason could the State have for abandoning that scheme, unless it intended to adopt a different plan?

Can it be supposed that the State of Tennessee, in 1851–2—"moved and instigated by the devil"—had deliberately concocted a plan which was intended to be a trap and snare to those dealing with her? If she intended to be an accommodation indorser, why not

say so plainly? If the railroad companies were to be primarily liable to the bondholder, why not state it in the Act?

If the several railroads were to be respectively mortgaged to directly secure the bondholder, why not continue the Acts of 1847–8, and let the company sign the bonds and make a mortgage to secure them?

Or if for any cause it was thought best for the State to sign the bonds as maker, why not require the bonds to show on their face to whom they were issued, and the fact that they were secured by a statutory mortgage on a particular railroad?

What possible motive could the State have in enacting a statute which should say one thing and mean another?

Why abandon the plain statute of 1847–8—which everybody could understand, and which provided precisely the plan contended for by complainant—if, indeed, she intended to continue it?

Was anything to be gained by indirection or double dealing?

And, lastly, if the State intended in the scheme of February 11, 1852, to be a trustee for the bondholders, why not say so in so many words, and provide the means by which the bondholder might enforce his claim against the property?

At the next session of the legislature, so much of the Act of 1847–8 is repealed as authorized the indorsement of the bonds of the East Tennessee & Georgia Railroad Company; and as to that particular road, it was enacted that whenever the Governor was satisfied that the building of the road had so far progressed as to make it prudent and proper to procure the iron rails and equipments for completing the same in sections of forty miles or more, then he is authorized and required to issue the coupon bonds of the State for an amount sufficient to pay for the iron rails and equipments to

Acts of 1849-50, Ch. XLII, § 11, *et seq.*

be placed on the said sections; and it was also provided that, "upon the issuance of said bonds to said "company, the said road, with all its appurtenances, "and the interest of the individual stockholders "therein, and the tolls, issues and profits of said road "from Dalton to the Tennessee river, shall be and is "by force of this Act vested in the State, for the "security of the State against the payment of the debt "authorized by this Act," etc., etc. Section 18 required the individual stockholders to accept and ratify the terms and conditions of the Act before the bonds should be issued. Ten new railroad companies were incorporated at this session of the legislature.

On the 10th day of October, 1851, Governor Tronsdale, in his annual message to the legislature of 1851–2, says: "The subject of internal improve- "ments is more exciting than any other likely to "occupy your attention during the session. The peo- "ple of each division of the State are aroused upon "the subject and have their plans of improvement, "some in progress and others in contemplation;" and after referring to several projected railroads and their importance to the *State*, he adds: "We are all satis- "fied of the benefits which would result to the *State* "from a well organized system of railroad communi- "cation; but the great question is, 'Can the State "'safely extend such aid to individual enterprise as "'will accomplish this desirable result?' This is a ques- "tion for the determination of your honorable body. "EXPERIENCE HAS SHOWN THAT PARTNERSHIPS BE- "TWEEN THE STATE AND INDIVIDUALS IN WORKS OF "INTERNAL IMPROVEMENT RESULT BADLY. Perhaps "the better plan would be to grant liberal charters to "companies composed of individuals for the construc- "tion of railroads. Let them, by their money and "labor, prepare their road for the rails and fixtures, "and then call upon the State for aid. Should it "appear from investigation that the improvements

Senate Journal, 1851-2, p. 50.

"thus made, when furnished would be profitable, let "a lien be taken by *the State*, upon the whole stock "of the company in the road as completed, and upon "the rails and fixtures, to save the State from loss, "then let the State *loan* her credit in State bonds "payable at a distant day—say fifty years or less, "bearing an interest at 6 per cent., payable semi-"annually at some commercial point in the United "States. Should the credit of the State not be im-"paired by the issue of bonds to an amount beyond "which it can safely go, the bonds will sell in the "market for a premium which might be applied in "the payment of interest. In this way works of in-"ternal improvements may be constructed and put in "operation, which would defray the expense of build-"ing and enrich the individual stockholders, and the "State be subjected to no cost and but little *risk* in "the aid she affords in the construction. I recommend "to your favorable consideration each of the roads "specified above as *meriting all the aid* the State can "safely give, while, at the same time, the interest of "*the State* should be strictly guarded and all neces-"sary steps taken to secure *her against loss.*"

XIX.

It will be thus seen that the prior history of the internal improvement system of Tennessee shows in great prominence the fact that the State had tried every other plan except the one in which the State should issue her own bonds, upon which she was alone responsible, and take a lien on the property of the company to secure her against loss on the loan, eschewing all partnerships either of stock in the road or joint liability on the bonds.

1. She had faithfully tried the plan of furnishing the money directly without any claim that it should be returned; but this bred jealousies, and the money

was wasted on innumerable small enterprises, until she had no more ready money in her treasury, and yet she had accomplished nothing.

2. She tried the "stock plan," by which she took stock in the railroads and paid her subscription for stock—not in money directly, but by issuing her bonds to the company. Each of these plans was amended from time to time, until it was evident neither would be successful in accomplishing her object speedily and safely; and even after she had supplemented these plans with banking schemes, she established a State bank, thus mobilizing her wealth, but all to no purpose.

3. She tried the "indorsement plan," by which the company and the State were jointly liable—the company primarily and the State secondarily liable, with an express lien on the railroad to secure each particular bond.

Thus she had tried the plan of giving, then the plan of one-third partnership in the stock, and then one-half. Then a partnership in the obligations or bonds issued by the company, without having accomplished her object; and now her Governor, in his opening message to the legislature, condenses her past experience in these striking words:

"*Experience has shown that partnerships between "the State and individuals in works of internal im-"provement result badly.*"

And now, by reading the Act of February 11, 1852, in the light of these former plans and this "experience," of which the Governor reminds the legislature, the reason is manifest why the legislature, in the scheme therein adopted, so carefully avoided the partnership between the State and the companies—either as to the body of the property represented by stock, or the liabilities necessary to be incurred to raise the means to

complete the road; why she reserved the power summarily to take possession of the road by her receiver without asking the aid of a court or the consent of anybody; why she reserved the power to pass all such laws as she deemed for HER *interest*, and never once mentioned the bondholder; in short, why she cut loose from all joint obligations, partnerships and trust relations, and provided that she as a sovereign might deal with the property as her interests might suggest.

She did not have the money in the treasury to advance such sums as were necessary, or she would certainly have done so; but she made such provisions as that her negotiable bonds were the equivalent of money, whereby no sale was made for less than par, and thus she accomplished the same result as if she had loaned the money instead of her negotiable bonds.

Under former schemes one difficulty was, that there was not sufficient private capital invested and work actually done to certainly secure completion of the enterprise even with State aid. Here, by section 1, a sufficient *bona fide* subscription (which shall be shown by the company to be good and solvent) to "grade, "bridge and prepare for the iron rails *the whole extent* "of the main trunk line proposed to be constructed," and at least thirty miles shall have been actually graded, bridged and crosstied, ready for the iron—then, and not till then, the loan or investment was to be made. Act 1852, § 1, Feb. 11.

A former scheme had the State and company *bound together* in a joint liability—the one as indorser, the other as maker; but here the legislature orders the Governor to issue "the coupon bonds of *the State of Tennessee*," with no reference whatever in or upon said bond to said company; no provision that the name of any company shall appear even as payee; no reference to the purpose for which the bond was issued on its face; no means of identifying such bond as having been issued to any one of the *fifteen* different

railroads provided for (nor, indeed, that it issued to any railroad), much less that it was secured by a mortgage, but it was to be a "coupon bond of *the State of Tennessee*." Under "the stock plan" the State bond was to be payable to the president and directors of the particular company. Here there is no such provision.

Under former schemes the money and bonds had been frittered away on impracticable schemes, or mis-
Act 1852, Feb. 11, § 2. applied. Here she provides against this by requiring the president to swear, and the directors resolve that they shall be applied alone for a particular purpose, on a particular road, which the legislature has expressly named, and in addition thereto provided that her Governor might appoint a commission to act under oath in conjunction with the president in negotiating the bonds, and wherever the interests of the *State* in the opinion of the Governor required it.

Under "the stock plan," the State received a part of the stock; under "the indorsement plan," the taking of a lien was to be done by a board of internal
Act 1852, Feb. 11, § 3. improvement. Here the State directly reserves the lien to herself as a sovereign, without the intervention of third parties.

Under the "indorsement plan" the board of internal improvement were to direct such proceedings either in "law or equity" as they might think necessary for the safety of the State. Here the Governor is authorized to seize the road for the State as a sovereign with-
§ 5. out any application to a Court, or any consultation with any third person.

In all the other systems the State, in order to assert her rights as lender or investor, had to divest herself of her sovereign protection against law-suits by apply-
§§ 5, 7. ing to Courts for relief. Here she, as a sovereign, seizes, holds and uses the property by directly ordering her marshals or sheriffs to forcibly take possession of it, and requires the money realized to be paid into

her treasury—every step in which is clearly free from the intervention of any third party, whether bondholder, stockholder, or Courts, and are the stately steppings of a sovereign who will allow no suggestions or interference, no partnerships or trust relations, no Court delays, but will manage and control the whole matter as she may think is to the *interests of the State*, until the maturity of the debt thirty or forty years hence, after the improvement has been established and the State has accomplished her chief purpose, then if for any unforeseen cause the whole § 6.
principal of the debt has not been covered by the sinking fund, the State will bring suit as to such balance in order to a permanent sale, if it be to her interest.

Under "the stock plan" the State's dividends from internal improvements and from the State bank were to be used as a sinking fund.

Under "the indorsement plan" there was no sinking fund.

Here a sinking fund is provided which will retire the whole principal before the State's bonds mature, in the way provided in the Act, to wit, returning to the State any of her bonds, and on failure to pay said installments or principal, the State, as a sovereign, takes possession.

In the other schemes there was no sufficient provision requiring information as to the work done and the management of the improvement. Here semi-annual reports to the State under oath are required up to completion, setting forth fully "the condition of the road and the company," and after completion, regular reports of the "financial condi- § 8.
" tion of the company, giving a statement of the trade "and travel upon the road, the receipts and expen- "ditures, net earnings and dividends, and what per "cent. is paid to the shareholders." These reports are to be laid before the Governor, and "the Gov-

"ernor shall lay said report before the legislature "*for its action.*"

In former schemes there was no provision against the officers of the company speculating in real estate along the line of the proposed road. Here they are
§ 9. required to make oath in advance that they will not do so.

In former schemes the gauge and weight of rails
§ 11. were left to the discretion of the company. Here the State fixes both.

In former schemes there was no reservation of the right to amend, alter or affect the contract. Here
§ 12. the State "*expressly reserves the* RIGHT" to enact thereafter all such laws as she may deem necessary to protect, not the trust estate, not the interest of the *cestuis que trust*, but the "*interests of the State.*"

In "the indorsement plan" there was no provision for the State to have a representative in the board
§ 17. of directors. Here the State by its Governor appoints two directors.

It is thus clearly shown that every material change from prior schemes wrought by the Act of February 11, 1852, is in the direction of a complete divorce of the State from all joint contracts, joint liabilities, partnerships or trust relations.

It is also shown by the concurrent history of the State in her efforts to establish her system of internal improvement up to 1851, that the precise thing which she would NOT do, was, to entangle herself again either as partner, indorser, trustee or otherwise. But (as might be expected from this prior legislation and history) the State did, by the Act of February 11, 1852—

1. Put herself in a position, by requiring information from time to time, to act advisedly and at the proper time to secure her interests.

2. To seize the property whenever she chose upon default, without delay or descending from her position as sovereign to invoke the aid of a Court.

3. To turn all the funds realized into her own treasury.

4. To reserve a lien to herself, to be enforced or used as she saw fit without suggestion or hindrance from any other party; and,

5. Realizing the possible difficulties that might occur, and that her interests might from time to time require further and different legislation, she makes her right to pass such laws as she may hereafter deem to her interest a *part of the contract.*

XX.

Let us now follow the subsequent history of this plan of February 11, 1852, and see how the State, the internal improvement companies and the State bondholder understood it, ascertain the practical construction put upon the plan;—How did the State understand it? What construction was put upon it by the railroads? How did the bondholders regard it?

The general understanding of a law and practice under it for a long period unquestioned by any suit brought, or public or private action, to test or settle the construction in the Courts, ought to be very strong, if not CONCLUSIVE *evidence of its true meaning and application.*

Scanlan vs. Childs, 33 Wisconsin R., 666.

The practical construction given to a State statute by the public officers of the State, although it can not be admitted as controlling, yet is not to be overlooked;

and perhaps should be regarded as *decisive* in a case of doubt or where the error is not plain.

Union Ins. Co. vs. Hoge, 21 Howard's R., 35.

Where an old statute has received an early practical construction, which, if it were *res integra*, it might be difficult to maintain, it will be adhered to, especially if great mischief would follow a contrary construction.

Rogers vs. Goodwin, 2 Mass., 475.
17 Mass., 122, 144.
3 Pick., 517.

In construing ancient statutes, cotemporaneous construction, as evidenced by usage, will not be departed from without the most cogent reasons; and if the construction is doubtful, usage will control.

Chestnut vs. Shane, 16 Ohio, 599.

Where, by the perusing of a statute, its meaning is rendered doubtful, it may be expounded by long usage; and though such usage—where it is contrary to the obvious meaning of the words of the statute—is not to be regarded, yet, where the words are doubtful, and the usage has been *acquiesced in* by both parties for a long series of years, it is conclusive.

Att'y-General vs. Bank of Cape Fear, 5 Ired. (N. C.), Eq. 71.
Bailey vs. Rolfe, 16 N. H., 247.

The first remarkable thing that attracts the attention is, that there are in the Acts of the Session of 1851-2

seven different Acts passed at that session, authorizing and directing State bonds to issue, to wit:

Ch. LXXII, $300,000 to East Tennessee & Virginia Railroad, to build bridges.

Ch. LXXXIX, $100,000 to East Tennessee & Georgia Railroad, to build bridges.

Ch. XCIV, $250,000, to *build the capitol.*

Ch. CX, $30,000 to Dyersburg & Mississippi Turnpike Company.

Ch. CLI, which is the Act of February 11, 1852, under which fifteen different railroads are provided for.

Ch. CLIII. Funding or renewal bonds, with coupons in lieu of those theretofore issued which had no coupons attached.

Ch. CCXXIV. Parceling out bonds to be issued to the East Tennessee & Georgia Railroad.

They each provide that the Governor shall issue the bonds of the State; and bonds were in fact issued under said Acts. The bonds issued under the Act of February 11, 1852, were evidently printed from the same plate, so that there was no particle of difference between the bonds issued to either of the fifteen railroads therein provided for. The turnpike bonds and the capitol bonds were each of the same issue.

So there were millions of dollars of State bonds issued from time to time after 1852 to different companies, many of which were not in existence in 1852, and all from the same plate, with precisely the same words and figures on the face and back of the bond, just as they were applied for.

Here is a practical construction by the State officers making no distinction between the bonds issued to the Dyersburg & Mississippi Turnpike & Plank Road Company—which were beyond all question without a lien—and those issued to railroad companies, making no difference between those bonds issued to one railroad company and those issued to another of the

fifteen companies mentioned in the Act of February 11, 1852,—making no difference between the bonds issued to companies thereafter incorporated and those issued for State purposes purely, or those issued to the companies mentioned in the Act of February 11, 1852.

It would have been the most natural and easy thing to have inserted the name of the company receiving the bonds in the blank on their face, if these State officers had supposed such bonds were a lien on the particular railroad by which they were received; but they did not do it in a single case.

It would have been natural to have stated on the face of the bond that such bond was a lien on the railroad whose company received it, if such had been their understanding.

It would have been natural when drafting the form of the bond to have stated that it was "issued under "the Act of February 11, 1852, by the terms of which "Act this bond is a lien," etc.; but in drafting the form for the bond they *do not mention the Act of February* 11, 1852. But, on the contrary, they do say generally, that—

Record, pp. 591, 607-8.

"This bond is issued in pursuance and under the "provisions of *an* Act of the general assembly of said "State passed at its session of 1851-2," and that "the faith of the State of Tennessee is hereby irrevo-"cably pledged" for its payment.

Now, these State officers knew that capitol bonds, turnpike bonds and renewal bonds were also issued under the Acts of 1851-2, and that no man—however closely he scrutinized the bonds or Acts of 1851-2, or both together—could possibly tell from either or both under which of the six or seven different Acts they were issued, nor for what purpose.

All these facts are inconceivable on any other theory than that all of said bonds were understood by the officers, who drafted the form and had them printed

and issued, to be alone upon the faith and honor of the State.

Indeed, the bonds sued on by complainant, and which he claims were issued to the Mississippi Central & Tennessee Railroad Company, are from the same plate, and have the words above quoted printed on them, to wit, that they were issued *in pursuance of* and *under an* Act of the general assembly of said State passed at its session of 1851–2; when the fact is, that said company was not *then in existence*, and was not created until several years afterward. So that if a party wishing to buy a State bond had a certified copy of every Act passed in 1851–2 in one hand and the bond in the other, it was impossible to identify it as having been issued for any particular purpose, or to any particular company. Indeed, when he examined the Act of February 11, 1852, he would find that there was no provision for the issuance of a State bond to any company except those therein particularly named, and that the Mississippi Central & Tennessee was not among the number.

Complainant's Deposition, p. 25.

Record, pp. 591, 607–8.

XXI.

But leaving this line of thought, let us pursue the legislation of Tennessee, beginning at the Acts of 1851–2, and see how this internal improvement system was developed, managed and controlled, so that with the legislation and history prior to the Act of 1851–2, and that subsequent thereto, we may have a full view of the system, and thus better understand any one of its provisions, and at the same time get a clear idea of how the State authorities understood the scheme of 1851–2.

It will be seen by reference to the Acts of 1853–4, that there were several acts passed amending the Internal Improvement Act of February 11, 1852, and that some of the amendments are material, and can be ac-

Acts 1853–4, Ch. CCXXV.

counted for only on the supposition that the State understood that the holder of her internal improvement bonds had no other right or claim than such as is expressed on the face of said bonds—the faith and honor of the State. In the Act of February 11, 1852, it was provided that no bonds should be issued on additional sections, after the first section of thirty miles, until twenty miles more was completed, which provision, if the bondholder had any lien on the property, was important to him, in that it required a large expenditure of money, and the extension of the line at least twenty miles before any other State bonds should be issued to such road; but the legislature, by section 4 of Ch. 225, of Acts of 1853-4, amended section 4 of the Act of February 11, 1852, by striking out "twenty" and inserting "ten," so that State bonds of equal lien with those outstanding might be issued on the completion of ten additional miles of the road. So, by Ch. 131, 1853-4, there is another material change in the terms of the Act of February 11, 1852, in this: that by the last named act the road was required to have (*before State bonds were to be loaned*) "subscriptions suffi- "cient to grade, BRIDGE and prepare for the iron "rails the whole extent of the main trunk line pro- "posed to be constructed," and shall show that "such "subscriptions are good and solvent," and shall have "graded, *bridged*," etc. Now, under this act, it is plain that the security to the creditor was—

Acts 1853-4, Ch. CXXXI.

1. Good and solvent subscriptions to "grade, *bridge* "and prepare for the iron rails the whole extent of the "main trunk line."

2. That at least thirty miles, if the application was for the first section, or twenty miles, if for a subsequent section, should have been *actually* graded, *bridged*, and ready to put down the necessary timbers for the reception of the iron rails, "fully prepared, with good materials."

The 2d section of the Act of 1853-4, Ch. 131, entirely changes these substantial provisions. Acts 1853-4, Ch. CXXXI, § 2.

1. It allows these State bonds to issue *before* a sufficient amount of good and solvent subscriptions to grade and bridge the whole trunk line is obtained—indeed, it authorizes these *State bonds* to be counted together with the stock, and if both together are sufficient to grade, bridge, etc., the bonds are to issue.

2. The State bonds were to be issued, not for the bridge alone, but also to build "the abutments and *embankments* connected with said bridge." In order to show how materially these amendments affect the security required by the Act of February 11, 1852, take any one of the railroads mentioned in the 10th and 19th sections of said last named Act and test it.

According to complainant's theory, the holder of State bonds (loaned to railroads) had a contract, which could not be violated, by the express terms of which no bond should be issued by the State unless the company had good and *bona fide* subscriptions sufficient to prepare for the iron rails the entire road, and had actually built the road-bed, embankments, *bridges*, etc., on the section for which bonds were asked, and yet the State, at the next meeting of the legislature, provides that this shall not be necessary, but they may count the bridge aid in order to supplement the stock, and may apply the bridge aid bonds to the building "the abutments and embankments connected with the said bridge," thus weakening the security, and at the same time watering the lien, for, under the Act of February 11, 1852, the *stockholders* were to build the bridges and embankments and abutments before the issuance of State bonds for such section, and after the section was prepared for the iron rails, the State issued only so many bonds per mile.

Acts 1853-4, Ch. CXXXI, § 2.

Acts 1851-2, Ch. CLI, § 1, and Ch. CCXXIV, § 5.

Another material change is, that under the Act of February 11, 1852, after the company had solvent subscriptions enough to build the whole road, and had actually built one section—bridges, embankments, and all—the State was not to issue exceeding eight thousand dollars per mile. Here, supposing the section to be completed was over one of the rivers named (some of which, by the way, are only about twenty yards across), instead of the State issuing $80,000 to iron and equip ten miles of completed road-bed, bridges, embankments, etc., she issues $100,000 for embankments, abutments, etc., and bridge, and $100,000 to iron and equip, so that the lien of the bondholder (if he had any by reason of bonds issued for a prior section), instead of having $80,000 additional bonds invested with an equal lien on the whole, and ten miles completed road added to the security, has $200,000 of bonds put on the same footing as his, thus watering his lien by $120,000 more than was allowed under the Act of February 11, 1852.

Acts 1851-2, Ch. CLI, § 1.

Acts 1853-4, Ch. CXXXI, §§ 1, 2.

How can these facts be reconciled with complainant's theory?

He claims that he had a contract, in the nature of a mortgage, which provided that bonds of not more than $8,000 per mile should be a lien on a completed road.

The State, which declared what the bondholder says is his mortgage by the Act of February 11, 1852, now issues $2,000 of bonds *per mile* in addition to the $8,000, and declares them equal as to the lien, and also bridge bonds to an indefinite amount as liens equal in dignity and right with that claimed by the prior bondholder.

Upon our theory, this increasing the State aid and weakening the security for the debt to the State, is both natural and just; *natural*, because the State was determined, as hereinbefore shown, to establish a successful system of internal improvements, what-

ever the cost, though, as a prudent investor, she endeavored to effect the result with as little cost and risk as possible; *just*, because as the State was the alone creditor of the companies, and the alone debtor to the bondholders, without trust relations, it was a matter in which the bondholder had no more interest than he had in any other appropriation of the money or credit of the State.

XXII.

Charters for a large number of railroads were granted in 1853–4, among them one to the Mississippi Central & Tennessee Railroad Company, though it was not organized under said charter for some time afterward. State bonds were authorized to be issued to many roads, and also to build the State Capitol.

Acts 1853–4, Ch. CXXXI, LXXXVI.

At the next session of the legislature in 1855–6, by chapter II, section 1, the Senate fixes the terminus of the Nashville & Northwestern Railroad (a railroad to which State aid was authorized in the Act of February 11, 1852, being the second road named in section 10 of the said act) at a different point from that fixed in its charter—making its trunk line shorter by many miles; and by section 3 it is provided that whenever the Nashville & Northwestern Railroad Company shall purchase the Hickman & Obion Railroad, *or three-fourths of its stock*, and take a lease on said road as therein provided, and has graded and bridged thirty miles of said Hickman & Obion road from the Mississippi river at Hickman eastwardly, "the coupon "bonds of the State shall issue to the *Nashville* & "*Northwestern Railroad Company*," at the rate of $10,000 per mile, on same terms and conditions as bonds issued to other railroad companies, under internal improvement laws.

Acts 1855–6, Ch. II.

Section 5 releases all stockholders of the Nashville & Northwestern Railroad who live west of the Mobile

& Ohio Railroad, and also the stockholders living in Henry county, Tennessee, from their subscriptions. Section 6 provides that "in lieu of a portion of the State aid to the Nashville & Northwestern Railroad," there shall be granted to the Memphis & Ohio Railroad Company the bonds of the State to assist in building certain bridges, "provided the amount of State aid "hereby granted to the Memphis & Ohio Railroad "shall not exceed the amount of *State aid* SAVED on "the Nashville & Northwestern Railroad by the "foregoing amendments."

Here the State changes the length of the trunk line, which, under the Act of February 11, 1852, the company had to have enough solvent subscriptions to build before they could obtain *any* State aid, and releases stockholders whose subscriptions had *already been obtained* from their subscription *absolutely*, and transfers her State aid from one road to another.

Acts 1855-6, Ch. XII.

By chapter 12, the State aid to the Mississippi Central & Tennessee Railroad Company for building a bridge over Big Hatchie, if found to be more than enough, may be "equally divided into three equal "parts between Forked Deer river on said Missis-"sippi Central & Tennessee Railway, and the two "forks of Obion river on the Mobile & Ohio Railroad," by the consent of said first named company.

Ch. XLIX.

Chapter 49 authorizes the Cincinnati, Cumberland Gap & Charleston Railroad Company (whose trunk line by its charter was to be across the State of Tennessee), without securing stock subscriptions to an amount sufficient to grade, bridge and cross-tie the whole trunk line—to obtain State aid as required by Act of February 11, 1852. It is allowed to receive

§ 1.

State aid at $10,000 per mile "whenever said company "shall have *subscribed* in *bona fide* stock an amount "sufficient to *grade* said railroad from or near Paint "Rock, the southern boundary line of the State of "Tennessee, to the Eastern Tennessee & Virginia road,

"or from north line of Tennessee to said railroad," and it is also authorized to use State aid appropriated for certain purposes for different purposes. § 2.

It will be seen in this case that it is not required to have the road graded or bridged, but simply *enough stock subscribed to grade.*

Chapter 52 authorizes the issuance of $100,000 of State bonds to Louisville & Nashville Railroad for Cumberland bridge, upon condition the company allow the State to appoint two directors to represent "the interest of the State," who shall have the same power in the board as if they represented $500,000 of stock. Ch. LII.

Chapter 54 extends the time in which several companies were required by Act of February 11, 1852, to comply with its terms. Chapter 58 defines and greatly enlarges the powers and duties of "road commissioners of the State." Chapter 60 allows two roads to consolidate, but it shall not "work any forfeiture of "the lien *retained by the State* on said railroad; but "the State shall retain the lien given by the Acts "which this is intended to amend," nor shall such consolidation work any forfeiture of the State aid granted either of said roads under Act of February 11, 1852. Ch. LIV. Ch. LVIII. Ch. LX.

Chapter 82 changes the Act of February 11, 1852, in several important particulars—among others it is provided that "hereafter the bonds of the State may "issue for ten miles of road or more, *graded* as re-"quired by existing laws, after the completion of the "first thirty miles," etc. So that for every ten miles graded, simply, the State puts out $10,000 of bonds per mile, which are made equal with the bonds then outstanding, which were issued on thirty miles of completed road, in the lien upon the completed part, without in any way consulting with the holders of said prior bonds. Ch. LXXXII.

Ch. XCVI. Ch. XCV, § 6. Chapter 96 authorizes the issue of State bonds to buy the Hermitage, and chapter 95, § 6, establishes an agricultural bureau.

Ch. XCVII. Chapter 97 provides that "in all cases where the aid "of the State has heretofore been, or may hereafter "be, *transferred* from one railroad company to "another, it shall not be lawful for the companies "to which such aid is transferred to receive more than "at the rate of $10,000 per mile except in such cases "as are specially excepted."

Ch. CXX. By chapter 120 many important changes are made, among them, in section 5, the sinking fund, under the Act of February 11, 1852, and Acts amendatory thereof, is *doubled*, and the time when it is to begin is *changed* —being five years from the issuance of bonds instead of five years from the completion of the road. This 2 per cent. sinking fund is to be paid in money instead of bonds; and the *State officers* therein named are to invest it in the "bonds of the State," and "re-invest all accruing interest in like securities;" and said State officers are to manage, govern and control said sinking fund. This provision applies to all State bonds issued to railroad companies theretofore, or which might thereafter be issued—and in this connection attention is called to the fact that it is not pretended by complainant that any of the bonds sued on—nor indeed any State bonds—had been issued to either defendant company in this suit *until after this last named Act was in force.*

Ch. CCXXI. Chapter 221 allows State bonds to issue to the Memphis & Charleston Railroad Company in case the tunnel at Waldron's Ridge costs more than $10,000 per mile.

Ch. CCXXII. Chapter 222 allows State bonds on another road to issue when a first section of fifteen miles—instead of thirty—is graded and bridged.

Ch. CCXXVII. Chapter 227 allows two roads to have a joint line from Nashville for ten miles, and the State is to issue

$10,000 per mile to each of said roads on said ten miles—or $20,000 per mile—and grants $200,000 to said two roads for bridge purposes besides.

Chapter 228 amends the 16th section of the Act of February 11, 1852, by repealing its proviso, and authorizes the issuance of $135,000 *additional* bonds—which said proviso prohibited. At the time this additional issue was authorized, there had already long before that time been issued to the Memphis & Charleston Railroad $760,000 of State bonds under the Act of February 11, 1852, and here the State in 1856—in the face of the proviso of said last Act, and without any pretense of consulting any supposed interest of the holders of the $760,000 of bonds previously issued to this road—authorizes $135,000 more, and declares that the State shall have a lien on account of the issuance of these, of the same force and equal in all respects to those previously issued. Ch. CCXXVIII. Ch. CCXXIX.

At the next session the legislature of 1857-8 by Ch. 30, section 12, authorized railroads to use a 50 lb. rail instead of a 100 lb. rail, as required by the 11th section of the Act of February 11, 1852, and yet be entitled to the same State aid as if the 100 lb. rail were used. Chapter 18 changes the requirements of section 1 of the Act of February 11, 1852, as to two roads. Chapter 44 authorizes the issuance of $9,000 per mile in State bonds to another road, on their doing two-thirds of the work necessary to prepare a section for the iron. Chapter 49 provides for the consolidation of two roads theretofore receiving State aid, and issuance of bonds to consolidated company without any reference to holders of prior bonds or saving their rights. Chapter 89 authorizes bridge bonds issued to two different companies to be used in building a common bridge—the change of location of a railroad named in the 10th section of the Act of February 11, 1852—a release of private subscription—and section 5 declares that "bridge aid" means not only the bridge and its Acts 1857-8, Ch. XXX. Ch. XVIII. Private Acts, Ch. XLIV. Ch. XLIX. Ch. LXXXIX.

abutments, etc., but also the embankments necessary to reach from the bridge to the high land beyond the overflow at high water mark, which in many cases amounts to miles.

Acts 1859-60, Ch. VII.

At the session of 1859–60, chapter 7 authorizes cancellation and new issue of certain State bonds and change of place of payment without any notice to railroads. Chapter 74 changes weight of iron rails. And by chapter 93, the sinking fund is increased to 2½ per cent. and made payable half yearly instead of annually—as to all bonds theretofore or thereafter issued—in money or "in the like character of bonds that may have been issued or indorsed" by the State for such company, and the sinking fund when paid in shall be passed directly to the credit of the company, "and be "a release to said company or corporation from that "amount *due by them to the State*," and thereafter "such company shall provide the interest semi-annu-"ally as now provided by law on the *amount* of bonds "unpaid at the time said interest falls due," and "not "on the *original amount* issued to or indorsed by the "State for said company as *heretofore* provided by "law."

Ch. LXXIV.
Ch. XCIII.

Section 9 provides that the Comptroller shall keep an account with each company, "charging them with "the *amount* of bonds originally issued to or indorsed "for said company or corporation by the State, and "crediting them by the *amount* of sinking fund paid, "and shall furnish the treasurer of the State a state-"ment of the *amount* due by each company or cor-"poration on first of June and December, each year, "that *he* may know *how* much interest each company "or corporation has to pay."

Section 1 provides that all moneys or bonds theretofore paid in by cities or railroad companies to the sinking fund commissioners, together with accruing interest thereon, shall be passed to the credit of the party

who paid it in, and "be a release for that amount on the debt due by them to the State of Tennessee."

In passing, we call attention to the confident argument of complainant's counsel, that the words in the above Act requiring the sinking fund to be paid "*in "the like character* of bonds that may have been is- "sued or indorsed by the State," mean the *same* bonds—or, to use their language, "bonds of the same character,"—is simply legislative verbosity for "the same bonds." This position, like most of their arguments, is utterly untenable. The words themselves are too plain for argument; but we are not without the clearest proof that this position is false. In the *House Journal* of 1859–60, p. 1076, Mr. Brazleton offered an amendment, "That all railroad companies be "allowed to pay their sinking fund in bonds bought "in by them of the same character issued to them or "indorsed for their benefit," which was rejected in the House; and thereupon Mr. Wisener offered an amendment to the bill—to strike out and insert in section 5 the following: "Said payment in bonds *shall be in the bonds* issued or indorsed for said company," which was adopted. But the House amendment was rejected by the Senate, and on page 1142 of said journal, it will be seen that the House receded from its action, and the Senate and House then adopted the words which trouble complainant—"in the like character of bonds." Thus, so far from being "legislative verbosity," or ignorance of language, they were adopted after full consideration, and the meaning which complainant gives them was distinctly and expressly rejected. Indeed, Mr. Wisener's amendment was in the very words of our adversary—the same bonds—"*the* bonds issued," etc., and was rejected.

House Journal, 1859-60, pp. 1076, 1077, 1142.

XXIII.

But returning to our argument, chapter 7, p. 153, transfers $150,000 of bonds, part of the aid granted the

Acts 1859-60, Ch. VII, p. 153.

Memphis & Charleston Railroad, to the Nashville & Chattanooga Railroad Company, "to be applied ex- "clusively in payment of *new* tracks, *new* embank- "ments, *new* masonry, *new* DEPOT BUILDINGS, and "*new* bridges, which may *have been*, or may hereafter "be made on the railroad between Stevenson and Chat- "tanooga, subsequent to the date of the contract "between said companies for the joint use of that part "of the road."

Ch. XX, p. 170. Chapter 20, p 170, authorizes an issuance of $28,000 of bonds in addition to the $200,000 already issued to repay the Louisville & Nashville and Edgefield & Kentucky Railroads for work done on Cumberland bridge, which was then in use, and to protect and secure said bridge—though by the former Act, allowing $200,000 for that purpose, it was enacted that no more than said sum should be issued for that purpose. All their bonds are put on the same footing.

Ch. XL, p. 204. By chapter 40, page 204, several railroad companies are authorized to unite and consolidate under a different name, "provided *the lien of the State* as *indem-* "*nity* against loss, on account of State aid which may "be furnished agreeably to the *laws now in force*, "shall in no wise be impaired by such consolidation." The fifth section of this Act allows another road to apply surplus bridge bonds "to *any* masonry along "the line or *other purpose* necessary to prepare said "road."

Ch. CLXXII, p. 536. By chapter 172, page 536, $45,000 in bonds are issued to aid in building embankments on another road, and are made of equal dignity to those then outstanding.

Ch. CLXXXII, p. 548. By chapter 182, page 548, the excess of bridge bonds authorized to two roads is to be applied to the work of "grading," etc., on other parts of the road, and such excess shall be counted as part of the capital stock of the company.

NOTE.—In 1850 the taxable property in Tennessee,

as shown by Comptroller's report, was $129,510,043, and nine years after, in 1859, was $377,208,641—an increase of $247,698,598—lands having increased in value from $3.25 to $8.19 per acre, thus justifying the wisdom of the statesmen of Tennessee, who determined the State to make the investment in internal improvements primarily for her own benefit, and caused her to continually vary the amount of her aid, so as to foster and build up her taxable wealth.

The Governor, in his message to the extra session of the legislature in January, 1861, calls attention to the fact that the two per cent. sinking fund of 1855–6, or that of 1859–60, would extinguish the entire debt of the State on account of its aid to railroads before maturity, and that it was a hardship in these times of pecuniary distress for railroads to be compelled to "pay any part "of the principal of a debt which does not fall due for "thirty years." He, therefore, recommends that the payment of the sinking fund be remitted for one year, and by chapter 10 the legislature *releases* the payment of this *sinking fund* for one year. The same legislature at its second extra session, by chapter 7, amends the internal improvement law of February 11, 1852, by making it discretionary with the Governor to appoint a receiver as therein provided, or permit the affairs of the several railroads of the State to remain in the hands and under the management of the company owning the same—as the interests of the *State* may suggest.

Acts Extra Session, 1861, Ch. X.

Second Extra Session, 1861, Ch. VII.

Shortly after this our civil war was begun, in which both sides vied with each other in destroying railroads, so that in four years railroads were generally a mass of ruins.

In 1865, under military domination, one W. G. Brownlow was declared Governor, having been voted for by a few persons in about one-half of the counties, two regiments of infantry, six regiments of cavalry, two batteries and one hospital. Total number of votes claimed to have been cast less than 23,500, soldiers and

House Journal, 1865, p. 16.

all. (See *House Journal*, 1865, page 16.) On the 4th May, 1865, a joint resolution was passed, appointing

Ibid, p. 150.

the comptroller, secretary of State, the *attorney general* of the State, and the commissioner of roads, to make a settlement with the Louisville & Nashville Railroad, and in case said company failed to settle, the attorney

Appendix to Senate Journal, 1865-6, pp. 283-5.

general was to begin suit against said company. On the 18th November, 1865, said committee reported to the legislature the settlement made, in which the State received any of her outstanding bonds in full settlement of the debt for internal improvement aid against the said railroad; and the committee, in their report to the legislature, say, among other things, "Believing it to be manifestly for the interest of the "State to call in this large installment of its indebt-"edness, and believing, moreover, that *the company* "*had a right under the law regulating the sinking* "*fund to pay off its* ENTIRE INDEBTEDNESS in the "bonds of the State," etc. This settlement on this report was approved and carried into effect.

Here is a *practical* construction of the Act of February 11, 1852.

Acts 1865-6, Ch. IX.

By section 6 of chapter 9 of the Acts of 1865–6, the railroad companies were relieved from the payment of any sinking fund until 1st of January, 1867, and after that time it was to be 4 per cent. per annum. Said Act also provided for funding all past due coupons from 1861 to and including January 1, 1866, and bonds falling due in 1867, in new State bonds, with no provision for distinguishing them.

Ch. XXIV.

Chapter 24 recites that certain railroads are in bad repair, bridges destroyed, etc., and that "The State has a large interest in said roads," and the companies were unable to put them in repair, etc.; and directs the Governor to issue certain amounts of Tennessee bonds to fifteen different railroads. or the "receivers of such roads," amounting, in the aggregate, to $3,483-000, and provides that the lien of the Act of February

11, 1852, "is hereby declared to extend to and cover "the money or bonds to be advanced to said roads "under this Act."

Among others the Mississippi Central Railroad is authorized to receive $200,000, and by section 4 it is provided "that each of said railroads to which relief "is granted by this Act shall pay to the treasurer of "the State as a sinking fund 4 per cent. on the amount "of its indebtedness under this Act, as also interest "on said bonds. The sinking fund to commence the "1st of January, 1867."

Whoever heard of a trustee expending immense sums of his own money to make an estate of which he was trustee valuable?

Chapter 43, section 7, Ch. 49 and Ch. 95 authorize a further issuance of bonds on same terms. Chap. 88 of Private Acts, section 50 *et seq.*, releases and appropriates the State's stock in certain railroads to building certain turnpikes. Chap. 94 authorizes the Governor to issue nine new bonds "of the *present* series" to certain parties who claimed to have lost nine bonds, without identifying them as same series. Chap. 12 of the Acts of 1866–7 authorizes large amounts of State bonds to issue to two railroads for the purpose of building depots in Memphis, paying for locomotives, and also to pay the United States a debt they owed her. These bonds were issued under the same "penalties and conditions" as those under Act of February 11, 1852. Bonds were also issued under said Act to other railroads, in all to the amount of $2,550,000; and by chap. 52 (Private Acts), $150,000 were authorized to issue to the Mississippi Central Railroad, and by chap. 66, section 26, to the Nashville & Northwestern, $125,000. Chapter 23 amends chapter 9 of the Acts of 1865–6, sections 6 and 7, by changing the year 1867, mentioned in said sections, to 1870, as the time at which a sinking fund begins under the Act.

Ch. XLIII, § 7, XLIX, XCV.

Ch. LXXXVIII, § 50.

Ch. XCIV.

Acts 1866–7, Ch. XII.

Ch. LII.

Ch. LXVI, § 26.

Ch. XXIII.

Acts 1867-8, Ch. XVII.

By chapter 17 of the Acts of 1867–8, the Nashville & Northwestern is authorized to receive $350,000 additional in State bonds to buy rolling stock, and so as to many other roads, said bonds amounting in all to $3,700,000. Section 6 of said Act is as follows:

"Be it enacted that the sum of two hundred thou-"sand dollars ($200,000) be LOANED to the Mississippi "Central Railroad Company."

Section 15 provides that if any railroad company to whom bonds had been loaned by this or any former Act shall fail for two years to pay interest on the loan, the State may sell such road on such terms and conditions as she thinks will best secure the interest of the State, and "shall retain of the pro-"ceeds of such sale the *amounts loaned* to said com-"pany," etc.

Section 16 says: "These loans shall be made in like "manner and under the same conditions imposed by "the internal improvement laws of the State."

Ch. LXIX.

Chapter 69 establishes a board of finance, who by section 3 are to "provide for the payment of interest on the State bonds," and so much of the debt of the State as falls due in three years; and to raise the money by a sale of State bonds, if necessary. Section 5 requires railroad companies to deposit with the *Comptroller* "fifteen days before *each installment of* "*interest on the bonds issued to it becomes due*," "a "sum of money sufficient to pay such interest, includ-"ing exchange and necessary commissions."

Acts 1868-9, Ch. XIX.

Chapter 19 of the Acts of 1868–9 requires railroad companies to pay the amount of interest to the Comptroller fifteen days before the State owes interest on her bonds, under penalty of the State's taking possession of the road by a receiver. Chapter 23 provides for the reduction of the number of railroad directors; the State to appoint an equal number to those elected by the company.

Ch. XXIII.

XXIV.

For more than a year the State finances were becoming desperate, the legislature failing to levy, or the revenue officers to collect, sufficient revenue to meet the interest on State bonds, as well as the principal of those bonds which were maturing. The railroads had not recovered from the effects of the war — many of them were in the hands of State receivers, who could make nothing by operating them — many others unable to pay the interest due the State.

Under these circumstances the State made a desperate effort to save herself, and at the same time re-establish an effective system of internal improvements by granting large aid to railroads; and would have succeeded if her officials had been honest and discreet. But, having no money in the treasury to pay maturing interest and bonds, she appointed a board of finance, consisting of five, to negotiate a permanent loan, and after the adjournment of the legislature of 1867-8, the board of finance got each other "by the ears." Three of the members of the board resigned — among them the Comptroller and Secretary of State — and the reasons given by these State officers for refusing to act, as set out in the Comptroller's report (*Senate Journal*, extra session, 1868), show that S. Watson—upon whose representations complainant relies—had no authority, and was acting against the interests of the State, and with a "ring of speculators in Tennessee bonds having its "head in New York."

Senate Journal, Extra Session, 1868, pp. 95-107.

About this time an injunction suit was brought against the State's financial correspondent in New York paying out some State funds in his hands, and the banks of New York refused to float a loan.

On the 10th of November, 1868, the reconstruction Governor, W. G. Brownlow, in his message shows that

House Appendix, 1868-9, p. 4.

the State had then six railroads in the hands of receivers, and was losing money by holding them, and he says, "I would have seized the two other roads for fail-"ure to pay the July interest, and placed them in the "hands of receivers, but that I had *learned from ex-"perience that to do so would only entail increased "burdens on the State treasury.*"

He then recommends that no further appropriations be made to railroads "except where the State has a "*large interest* in said roads, and would suffer heavy "loss on account of the lack of such appropriations." He then mentions instances of railroads which, in order to become "profitable and productive *to the State*," will require additional appropriations. But he says, "I propose, however, to meet these demands in a way "not to increase the liabilities of the State." He then states the plan, which is to authorize railroads which are able to float a loan to issue their mortgage bonds, and with the proceeds purchase State bonds; and, delivering up the State bonds for cancellation, thereby an amount now due by the State would be transferred to the railroads, and the State relieved to that extent. He says: "I regard this proposition with approval, "and advise its adoption by the Assembly. The pay-"ment of large debts now due from the roads alluded "to, and the sale of the roads already in the hands of "receivers, would reduce the State liabilities at least "one-third. This plan, it is seen, would enable the "General Assembly not only to reduce materially the "State's liabilities, but also to render such necessary "*additional aid* to the roads whose completion is "demanded by considerations of *public economy*."

Acts 1868-9, Ch. XXXVIII.

The legislature of 1868–9 passed an Act, chap. 38, reciting that it was desirable for the general welfare of the State that the State shall be reimbursed the "*amounts*" advanced to railroads as rapidly as possible.

Sec. 1 authorizes the companies to repay the State

any part of their principal indebtedness to her, in the bonds of the State. Sec. 2, in order to enable them to do so, authorizes them to issue an equal amount of mortgage bonds, to which the State's lien shall attach *pro rata* with the unretired part of the indebtedness to the State. Sec. 3, in order to further aid them, authorizes consolidation of roads. The consolidated company may adopt the franchises of either company and issue bonds and stock. Sec. 4 declares the acts to be done in order to transfer the State lien, and by whom. Secs. 6, 7 and 8 authorize any person, with the consent of the company, to pay the debt of the company to the State, or any part of it, and provides for the assignment of the State's lien to such party; and the proviso to section 8 provides that the Act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated, or affect the interest of the present bondholders of the State, and that railroads issuing their mortgage bonds shall pay the State, bonds of same series as those issued to them.

The State, finding that she was sinking money every day she held the Nashville & Northwestern Railroad, although she had issued many thousand dollars in bonds to the receiver to enable it to repair its road, by joint resolution, adopted December 3, 1868, instructed the Governor to turn it over to the company, and in an elaborate report the judiciary committee recommended a sale of all defaulting railroads as soon as possible.

Acts 1868–9, p. 383.

House Appendix, 1868–9, pp. 225–236.

Chapter 3 of the Acts of 1869–70 provides for the removal of all receivers of railroads, and that the Governor appoint the president of such company as "*receiver of the State*" in the management of such railroad, requiring bond, etc., and prohibits the issuance of State bonds to railroads in the hands of receivers.

Acts 1869–70, Ch. III, §§ 1, 6.

Ch. XXXI. Chapter 31 prohibits all further State aid to railroads or turnpikes.

Ch. XXXVI. Chapter 36 authorizes the Consolidated East Tennessee, Virginia & Georgia Railroad Company to issue bonds payable at such date and bearing such interest as they deem best, "with which to retire the State "debt, under the provisions of the Act of February 25, "1869."

Ch. XLVII. Chapter 47 authorizes railroads to pay their State debt in any outstanding legally issued 6 per cent. bonds of the State, and past due interest in past due

Ch. XXI. coupons, and by chapter 21 the State authorizes and confirms as a party thereto a lease of the Nashville & Northwestern Railway to the Nashville & Chattanooga

Ch. VII. Railroad Company. Chap. 7 (Public Acts) provides that the State shall have as many directors in railroad companies as the bonds or money it has advanced bear

Ch. LXVIII. to the amount advanced by stockholders. Chap. 68 suspends the payment of sinking fund in favor of *one*

Ch. LXXVII. road until 1st January, 1872. Chap. 77 provides for the funding of all past due bonds and coupons of the State, also bank notes of the Bank of Tennessee and outstanding State warrants, into new State bonds. Sec. 3 provides that the interest that may be due or which shall fall due by 1st January, 1872, to the State, on bonds issued to railroads, may be paid by said companies in State bonds or coupons. There is no provision requiring any separation or distinction to be made as to bonds, bank notes or warrants funded; but a person owning one bond issued to a railroad, some bank notes and some warrants, may have a new bond combining them all.

This Act, which (by sec. 3) provides for payment by railroads of interest in bonds of the State, was accepted by all parties.

Ch. LVIII. Chapter 58, Private Acts, section 7, authorizes the board of commissioners to sell a certain railroad.

Chapter 69 of the Acts of 1870 suspends payment of sinking fund on all railroads (which have paid their interest to the State) until January, 1872. Acts 1870, Ch. LXIX.

Chapter 79 recites that the time has arrived "when "it is necessary to protect the interests of the State, "and to secure the State from loss in consequence of "the issuance of bonds to the different railroads," etc., and appoints a commission, who are directed to sell each defaulting railroad for a sum equal to the amount of State bonds issued to such road, and the unpaid interest due—the purchaser to pay and discharge said sum in any of the legally issued State bonds, the State undertaking to put the purchaser in full possession, and in case of sale, shall give preference to the purchaser who will obligate himself to operate the whole road. If a sale for the price above named can not be made, they shall receive sealed bids, and report same to the next legislature. Ch. LXXIX.

Chapter 93 authorizes the commission to lease any defaulting railroad which they have been unable to sell to any party who will keep it in repair and pay the interest due this State in coupons or money; and if they can not lease it on these terms, they are authorized to lease it on such terms as they may deem best "to secure the interests of the State," subject to the approval of the legislature. Ch. XCIII.

Chapter 116 authorizes the attorney-general, "in the name of the State," to institute suit against the Tennessee & Pacific Railroad for fraudulently obtaining issuance of $885,000 of State bonds, contrary to the provisions of the internal improvement law; and by joint resolution No. 1 the attorney-general was directed to institute legal proceedings "in the name of the State," to recover $100,000 of State bonds issued to Mineral Home Railroad. Ch. CXVI. Joint Resolution No. I.

So, by Acts of 1870–71, chapters 1 and 2, certain suits are authorized against State railroad receivers Acts 1870-1, Ch. I, II, XLIII.

for State bonds illegally received or disposed of, and by chapter 43, against other railroad companies.

Ch. XXIII. Chapter 23 requires that a bill shall be at once filed in the Chancery Court at Nashville for a sale of all the delinquent railroads, the purchase money to be paid in legally issued State bonds, and section 11 provides that on any future failure of other roads to pay interest on sinking fund, a like bill shall be filed for their sale.

Ch. CV. Chapter 105 provides that in case any railroad on which the State has a lien is sold under proceedings in the Court of Bankruptcy, the Comptroller may bid the amount of State's lien on same; and in the event of any higher bid, the State will receive said amount in State bonds or coupons.

Acts 1871, Ch. XXXVII, LXIX. In the Acts of 1871, chapter 37 grants further powers to commissioners to perfect the sale of railroads; chapter 69 authorizes consolidations of railroads only on condition that they pay their indebtedness to the

Ch. CXXVII. State. Chapter 127 authorizes a suit "in the name of the State," to sell the Tennessee & Pacific Railroad. Said Act also allows said company to discharge the whole debt by paying to the State an amount of State bonds *less than the amount issued to and received by*

Ch. CXLIV. *it.* Chapter 144 authorizes all railroads to make mortgages in order to pay off their debt to the State.

Acts 1872, Ch. VI, IX, XV. Chapters 6, 9 and 15 of the extra session of 1872, are also in the direction of closing out all railroad debts due the State.

Acts 1873, Ch. VIII, XXIV. Chapter 8, of the Acts of 1873, authorizes railroads to issue income or consolidated bonds for the purpose of paying off the State debt in State bonds. Chapter 24 authorizes the funding of all past due bonds and coupons of the State maturing before the first of January, 1874, into "the new series of funding bonds." Section 9 authorizes the registration of bonds falling due in or after January, 1874. Section 3 pledges the faith, honor and credit of the State to pay said fund-

ing and registered bonds at maturity, and to provide a sinking fund for that purpose, and for payment of interest, "*and it is hereby made the duty of the "treasurer of the State to set apart for that exclusive "purpose* so much of the revenues as may be neces- "sary to pay the interest on said bonds, commencing "with the interest due the first day of July, 1874." Section 11 authorizes the funding of bonds falling due from July, 1874, to July, 1884, at the option of the State.

This Act was accepted by all the bondholders. Record, pp. 590, 291, 292.

Chapter 102 authorizes the sale of all the State's interest in turnpike and plank roads, the purchaser to pay therefor in any legally issued bonds of the State. Ch. CII.

XXV.

This bird's-eye view of legislation subsequent to the Act of February 11, 1852, like that preceding it, makes it manifest that complainant's "latter-day" construction of said Act is radically wrong and untenable.

It further shows that the practical construction of the several legislatures, whether whig or democratic, military or republican, were all against complainant's theory.

Now add to this the acts of State officials, and the practical construction of said Act is overwhelmingly settled so far as the State is concerned. The proof on this head is full and uncontradicted, showing that the practical construction of said Act by the officers of the State has been uniform, and distinctly in opposition to complainant's theory. (See Governor Porter's, Governor Brown's and Comptroller Gaines' Depositions *et al.*) Porter's, Brown's and Gaines' Depositions. Record, pp. 306, 312, 287, 552, 427-8, 463, 471-3. Record, pp 607-8.

The bonds were made payable to " or order," instead of to the particular company receiving them.

The bonds do not identify the Act under which they were issued.

The name of the company receiving them nowhere appears in or upon the bond, either as indorser, surety, payee, or guarantor.

Record, pp. 607-8. No reference is made in or upon the bond to any mortgage or other security; but, on the contrary, it is expressly stated that the thing pledged for the payment is "*the faith of the State of Tennessee.*"

Bonds for

building the capitol,
buying the Hermitage,
establishing the agricultural bureau,
building a turnpike, and
for aid to railroads,

are issued of the same series and letter, and from the same engraved plate.

Record, p. 309. The interest upon all the State bonds is paid when the interest on any is paid; no difference is made; and when the State defaults on any of its bonds it defaults on all. The money paid by railroads for interest is not kept separate from other State funds at any time, and even when the State is in default in paying the interest on her bonds, such sums as are paid in for interest by railroads are not applied to payment of interest on bonds issued to the particular railroads paying it in, nor even to paying interest on internal improvement bonds, but is used for other State purposes.

Record, pp. 527, 531-4.

Record, pp. 306-7, 313.

Record, pp. 456, 313, 306, 507. The sinking fund was received in any of the bonds of the State so long as railroads were required to pay the sinking fund in bonds, and when they were required to pay the same in money it was invested by State officials in any bonds of the State, without regard to whom or for what purpose they were issued.

Record, p. 312. Receivers of railroads in default were appointed, qualified and put in possession without reference to the holders of any State bonds. New State bonds

Record, pp. 496, 287, 313.

were issued to such receivers to aid in building up and repairing the roads in their possession, and whenever any money was realized from receivers it was at once mixed with other State funds and used for State purposes. In short, every act of State officials in connection with the internal improvement system is an utter negation of complainant's construction, and a plain, practical, uniform construction inconsistent with the idea that the bondholder had any lien, or that the State was a trustee.

Record, pp. 306, 307, 312.

XXVI.

Having thus seen the practical construction of the *State* for over twenty years, let us next see how the *railroads* understood this internal improvement law. The proof shows that no railroad company kept the numbers, letters, or other description of the bonds issued to them; that they never paid any single coupon on any bond issued to them to the holder of the bond; that they utterly neglected to do precisely those things which they would have done if they thought their property was mortgaged for the payment thereof to the holder of these bonds; that they never attempted to find the bonds issued to them when they were purchasing bonds to pay the sinking fund or interest; that they all considered when they had paid the interest to the Bank of Tennessee, or the sinking fund to the proper State officer, that they had nothing further to do as to that part of their debt, but that such deposit or payment was a full satisfaction of that amount. In selling the bonds issued by the State and received by them, there was never a suggestion or representation that such bonds were secured by a lien on their railroads respectively—though some of the companies were in excellent credit, and had lines which any business man, upon having his attention called to them, would see were important railroad lines which would necessarily be of great value, while

Record, pp. 449, 501-2, 548.

Record, p. 456.

Record, pp. 449, 464, 466, 471-2, 488, 500, 506, 548.

other companies had no credit, and were in charge of lines which, after being built, would never pay the interest on the amount necessary to build them. And yet they all sell the bonds at the same price, generally through a broker, who neither knew, nor did the purchaser know, for what purpose they were issued.

Record, pp. 431, 432-3, 439, 473.

There is no single case proven where any railroad company represented its value, location, condition of the country through which it passed, in order to aid in the sale of the bonds.

There is no effort by railroads, which were paying interest to the State on her loan while the State was in default, to have the interest so paid in held as a trust fund for payment of the particular coupons of bonds issued to it.

There is no claim by the stockholders that the money realized by the State, when she took possession of their road, should be paid to any particular bondholder or used or held for any particular purpose.

There was no effort by any company to exchange their mortgage bonds with the holder of the State bonds which had been received and sold by it, and thus relieve itself from State directors and State interference.

In short, there is not the slightest dealing between the company and the State bondholder from the beginning to the end, nor any—even the faintest—recognition of any relation whatever between them; but, on the contrary, the companies always and everywhere treated the State as their alone creditor.

These things are inconceivable if the complainant's construction is correct.

XXVII.

Now let us see what was the practical construction put on the Act of February 11, 1852, and the Internal Improvement Laws of Tennessee, by the *bondholder* himself, and if these three all agree in

the practical construction of the said Act—the State, the railroad company, and the bondholder—the law, as well as common sense and good conscience, will not allow that construction to be overturned after the lapse of a quarter of a century, especially where such overturning would crush the rights of innocent third parties, or where the parties themselves could not be put *in statu quo*.

The first remarkable fact as to the bondholder is, that complainant—though secretary for awhile, and afterward treasurer of an organized association of bondholders who, moved by self-interest and the excitement of a great speculation, have searched in every direction, and with great earnestness and wisdom—has yet never been able to produce one single person who originally bought a Tennessee bond who will prove that he understood, when the bonds or any of them were first sold and bought, that there was any other claim for the holder to secure its payment, except the faith and honor of the State—not one. Record, pp. 584, 576.

After reading the Bill in this cause, one would suppose that every original purchaser of Tennessee bonds was ready to prove that the chief consideration which he relied on in such purchase for the payment of the bond was, that the bond was secured by a mortgage on a particular railroad, and that the villainous railroad companies and a corrupt and faithless State, both moved and instigated by the devil, had concocted in fraud a plan to rob the meek and honest bondholder of the very security upon which when purchasing the bonds he relied for their payment.

Is it not *pitiful* that complainant has been unable to produce one single witness who, when the bonds were originally sold, bought them with the understanding that they were secured by a lien?

Indeed there is not a single purchaser produced who pretends that he knew or ever heard it intimated that the bond he was purchasing was issued to a railway

Record, pp. 434, 439-40, 488.

company at all. But, on the contrary, it is shown that these bonds were sold by brokers in the New York Stock Exchange, where neither the broker selling nor the broker buying, nor the person for whom they were bought, could have known or relied on anything for their security or payment save the faith of the State of Tennessee alone.

Record, pp. 308-9.

Some of the railroads aided were of great intrinsic value—some were without present or prospective value. If the bondholder had ever dreamed of such a construction as complainant now puts on the Act of February 11, 1852, is it not certain that there would have been a vast difference in the price of the bonds? But

Record, pp. 309 472-3, 482.

the facts proven show that there was no difference whatever.

Here is a practical construction by the bondholders which can not be mistaken or evaded.

They would have us believe the credit of the State of Tennessee was not good, and they quote from messages of Governors, etc., to show that it was not. And yet these wise bondholders, whose sense of ultimate security is so acute that every circumstance and rumor is fully weighed to such an extent that the stock and

Record, pp. 307-8

bond market is never at rest—these bondholders paid precisely the same price for a Tennessee bond issued to build the capitol, to buy the Hermitage, to establish the agricultural bureau, to build turnpikes, as for bonds issued to railroads. More than this: bonds

Record, pp. 309, 311, 312.

issued to wealthy and perfectly solvent railroads brought precisely the same price as those issued to railroads which were utterly insolvent. Nor is this all: some railroads paid their interest and sinking fund promptly, and some were always in default and were seized by the State prior to the late war; and yet there was no difference in the price of Tennessee bonds.

Record, pp. 579, 580, 601.

No State bondholder ever applied to a railroad company to pay the coupons maturing on his bond, though some of them were notoriously ready and prompt to

pay whatever they owed. And if you will add to this another fact, it becomes overwhelming—and that is, that the State of Tennessee was in default in paying her interest for many years, and yet no bondholder ever intimated to a railroad company that he wanted it to pay his dishonored coupon. The State received large amounts of interest and sinking fund from railroads, *while she herself was in default*, and yet these bondholders never, by petition or otherwise, suggest that such amounts so received are trust funds for the payment of their dishonored coupons. The State publicly seized the defendants' railroad, and by her receiver *collected the very interest now claimed*, paid it into her treasury, and paid it out for other purposes, and yet no bondholder ever intimated to the State that said fund was a trust fund!

Record, p. 309.

Record, p. 286.

Record, pp. 337, 312-14, 286

Record, pp. 310, 311, 315.

This uniform quotation of Tennessee bonds continued for a quarter of a century after the passage of the Act of February 11, 1852, through all conceivable changes in the values of railroads—through all the devastations of the most terrible war of modern times—whether the State paid interest or defaulted—whether the railroad paid interest and sinking fund or defaulted—whether the State aid granted per mile was $8,000 or $40,000—whether the road was solvent or insolvent—whether the State had sold the road under her mortgage of 1852 or not—there was no difference in the value of one State bond from that of another.

These things settle the practical construction of said Act by the bondholders, and settle it against the present speculator's theory; but we are not left on this point to these evidences of such construction. There are others.

These holders of Tennessee bonds issued for internal improvements have always and everywhere, for twenty-five years, treated the State of Tennessee as their alone debtor. They must have known that the Louisville & Nashville Railroad, in 1865, paid off the lien of the

State and the debt for State aid in the bonds of the State without regard to number, series or purpose of issuance. These bondholders had received no interest on their bonds for over four years prior to that time—a great war had ceased which had raged to and fro over Tennessee, and now Tennessee, for the first time since the declaration of peace, had a person claiming to be Governor and an organized legislature. It was natural that these bondholders should watch with eagerness the steps taken by these authorities, and the prospect of receiving payment of their many past due coupons; and the first thing that attracts attention is the intense language of Governor Brownlow that the Louisville & Nashville Railroad Company must be *made to settle,* and the appointment by the legislature of a committee, among whom was the attorney-general of the State—her legal adviser—with instructions to compel a settlement or institute suit against said company. These bondholders must have read the report—where the law of February 11, 1852, is construed and practically acted upon, where the committee distinctly say that it is the right of railroad companies to pay all their internal improvement debt in bonds of the State—and yet these bondholders (and among them those who held bonds originally issued to the Louisville & Nashville Railroad Company) accepted the terms of the Funding Act of November 23, 1865, and received new bonds of the State for all coupons maturing on or before January 1, 1866, section 7 of which creates the sinking fund of 4 per cent., to be paid by each railroad company "on the amount of *its indebtedness to the State* as a sinking fund on said debt."

Record, p. 291.

These bondholders were not paid their coupons falling due after 1866, and in 1870 accepted the provisions of the Funding Act of February 24, 1870, in which State bonds, past due, coupons past due or which may become due on or before January, 1874, bank notes of the Bank of Tennessee and outstanding

State warrants were altogether, without distinction, authorized to be funded into new State bonds. Section 3 of this Act provides that "the amount of interest "now due, or that may fall due by the 1st January, "1872, to the State, on bonds issued to railroad com- "panies, may be paid by said companies in the bonds "of the State or past due coupons."

There was another default by the State after the acceptance of the terms of the last mentioned Act by the bondholders, and having failed to keep her engagements in the two previous funding acts, after acceptance by the bondholders, she now, by the Act approved March 17, 1873, makes a new proposition to the holders of her bonds, to wit: that if they will exchange their past due coupons and bonds for new State bonds, and register such bonds as are not yet due, as therein provided, she will not only renew the pledge of her faith and honor (which the bondholder already held pledged for the payment of his bond and coupons), but, in addition thereto, she will give undoubted security for the prompt payment of said new bonds and interest thereon, and the registered bonds and interest at maturity. Acts 1873, Ch. XXIV.

What was this security? Was it to transfer her lien on railroads? No. It was that she would by law, and as one of the terms of the proposed contract, make it "the *duty* of the treasurer of the State to "set apart for that exclusive purpose so much of "the revenues as may be necessary to pay the interest "on said bonds."

At a glance, this will be seen to be not only a new but a perfect security; for, as soon as the treasurer received enough funds to pay said interest, and before any part of the revenue could be used for any State purpose—even for paying the current expenses of the State—he was to set apart enough as a trust fund for the exclusive purpose of paying these bondholders. This made the treasurer a trustee,

and, as a part of the contract, made it his duty to so set apart this fund for this exclusive purpose, so that the bondholder, in case he was not promptly paid, was relieved from any trouble as to litigating with a sovereign, and had only to ask a *mandamus* to compel the treasurer to perform his duty—a proceeding in which the State was in no sense a necessary party.

Here, then, was a new contract proposed, in which the bondholder was to have—

1. The faith and honor of the State; and,

2. A trust fund to secure the payment of his claim.

Record, pp. 291, 292, 590, 601, 420.

The bondholders all accepted this new contract.

The State again defaulted in the payment of interest on her bonds, and at the same time was seizing railroads which had not paid their interest and operating some by receivers—selling others and transferring the title to purchasers and putting them in possession—and using the funds paid in by solvent railroads, and realized by receivers of defaulting railroads, and the proceeds of the sales of insolvent railroads, for other purposes; and yet the bondholders, so far from objecting to these proceedings or claiming any rights as against the railroads or funds so realized, were comforting themselves with the idea that their debtor was forcing all her debtors to settle with her, and thereby she would be able in the near future to resume payment of her debts. Indeed these bondholders were so anxious to have the railroad companies settle their internal improvement debts by retiring State bonds of any series to the State in satisfaction thereof, that members of the "committee of Tennessee bondholders" took it upon themselves to advise the State "that the debtors of "this State be *required* within a reasonable time—say "by or before July 1, 1877—to pay off *every obliga-*"*tion due from them to the* STATE, as now they may

Letters of Geddes & Smith, E. D. Morgan & Co., February 23, 1877.

Record, pp. 319, 381, 383, 325, 327–8, 337, 351, 356, 369, 370, 375, 357, 384, 385–6, 396, 398, 405, 298–9, 377–8, 406.

"do, after which time only such advances as were "specifically made to each, be received in payment or "cash—this to apply to principal and interest." (See letter of Geddes & Smith, and E. D. Morgan & Co., of February 23, 1877.)

In all these varied transactions, covering more than a quarter of a century, the bondholder was always and under all circumstances uniform in his practical construction of the internal improvement laws.

These circumstances were such that self-interest required a different course from that pursued—if indeed the bondholder ever construed the Act of February 11, 1852, as giving him a lien on railroads or making the State a trustee—and yet, through it all, he affirms that he looks alone to the faith and honor of the State for the payment of his bonds and coupons.

Here, then, we have the practical construction of the said statute—by the State and by the railroad companies and by the bondholder—not in doubtful terms, or under circumstances not calculated to manifest their real understanding and construction—not in one single transaction, or for a short time, but a practical construction—so plain, so often repeated under circumstances calculated to develop other views (if such were ever conceived)—so long continued, that the rules of law and the interests of society, not to say common honesty, require that such construction shall not now be disturbed.

And so we conclude this point as to practical cotemporary and long-continued construction, with the remark that whatever may have been the technically proper construction of the Act of February 11, 1852, this practical exposition is too strong and obstinate to be shaken or controlled, and is entirely conclusive of this case.

See authorities, *supra*, and
Stuart vs. Laird, 1 Cranch, 299.
Shephard vs. Gosnold, Vaughan R., 169.

Contemporanea expositio est fortissima in lege.

Kent's Comm., vol. 1, p. 465 and note, 6 Wheaton, 418.

Optimus interpres rerum usus.

2 Just., 282; Broom's Legal Maxims, p. 824.

XXVIII.

It does not affect this question in the slightest, whether we construe the Act of February 11, 1852, as a statute, or whether we treat it as an ordinary contract, or (to use an expression of the other side), a "trilateral consensual agreement." If it be treated as an agreement between the State, the company and the bondholder, the question remains, "How did they understand it?" The object in the construction of a contract is to ascertain the mind of the parties adopting it. What did they agree to? That is, What are the terms and conditions as they understood them, and so understanding, consented to be bound by them?

It has been said, "Tell me what has been done under a contract, and I will tell you what it means."

Treating this Act as a "trilateral consensual contract," we find all the parties for twenty-five years giving it the same practical construction—each acting under it as they understood it—no conflict, no clashing, no misunderstanding. Each by his omission to do certain things, as well as by acts of commission, through a long series of years and change of circumstances, holding out to the world his understanding of the contract, with a uniformity which would never have been marred but for the ingenuity of lynx-eyed speculators! Under such an open, notorious, long-continued and uniform practical construction of this contract, and upon the faith that it was the true one, the *statu quo* of the parties has been changed, insomuch that no court on earth could restore them. On

this faith, immense and varied transactions have been had by the parties themselves; on this faith, strangers have invested millions in the purchase of railroads; on this faith, railroad companies have issued and sold about $20,000,000 of bonds broadcast over the world; on this faith, these bonds are now held by innocent purchasers.

Who are the persons who would upset these settled transactions of a lifetime? A squad of organized speculators, who fear to come in proper person and bring their bill, but who put forth Calvin Amory Stevens, and covenant secretly against any liability. Record, pp. 575-6, 585, 584, 586-7, 600, 602.

What is the ground upon which they propose to uproot the doings of a quarter of a century?

Is it that any one of the parties to the original contract misunderstood its terms—was overreached? No!

Is it that the original bondholders have been deprived of a security upon which they rested, or that they have been deprived of anything that they understood they were getting when they made the contract? No!

Is it founded on a claim that arose soon after the contract was made? No! Nothing of the kind. It is founded on a supposed discovery, twenty-five years after the contract was made, that by a technical construction of certain words in the contract, it is possible that all the parties to the contract misunderstood it, and that the transactions of a lifetime by all the parties to it were based on an improper construction of its terms!

What is the end to be reached—what is the result to be effected, by upturning all these past transactions? Is it the public safety—the common good? No! It is to pay a speculator, who recently bought bonds at 60 per cent. to 80 per cent. discount, with full knowledge of all the facts, over 300 per cent. on his speculation. Record, pp. 601, 598-9.

It may be said that these facts should not be considered by a Court whose duty it is to administer the law; but a little reflection will show that such an assertion is a great mistake. The very basis of the conservatism of law is in the hesitation shown by all Courts in uprooting long-settled transactions. The rule of *stare decisis* in Courts is based on the wisdom of the ages, that "it is generally more important that "the rule of law should be settled than that it should "be theoretically correct"; and this because it unsettles past transactions and weakens confidence in the stability of things to be done.

Prescription, usage, common law itself, illustrate this doctrine. And so, when a contract is ambiguous, and the parties have acted under it, and their *status quo* has been changed under an agreed practical construction of it, and in a long series of years the rights of others have been based thereon, the overturning of the construction is contrary alike to the spirit of our government, which abhors retrospective statutes, and to the conservatism of law itself, which refuses to disturb settled transactions based upon a mutual understanding of the terms of a contract, though as an original theoretical question that construction would not have been arrived at.

Tindal, *C. J.*, in 8 Bingham, 181, says: "the general and leading principle" in the construction of contracts is "to look to the words of the instrument and to the "acts of the parties to ascertain what their intention "was."

And in Ohio it is held that where uniform practice has given a construction to a statute, it will not be disturbed, unless manifestly erroneous. The provisions of a statute ought to receive such reasonable construction, if the words and subject matter will admit of it, that the *existing rights* of the public or of individuals be *not infringed*. It is also a rule that

they be so construed that *no man who is innocent* be *endamaged.*

Moore's Lessee vs. Vance, 1 Ohio, 1–12.

XXIX.

There is one section of the Act of February 11, 1852, of which we have not spoken, and it is a very important one, both as showing the intention of the legislature, as to the State not being fettered with any trust relation, and an utter negation of any other relation to the bondholder than that of simple debtor and creditor, as the Act stood *then*—as well as the right in the future, without let or hindrance, to amend the Act, so as to conform to what she conceived to be her interest, saving the rights—not of the bondholder—but alone of the stockholder; and of these latter only such as were *vested.*

Section 12 is as follows:

"Be it enacted, that the State of Tennessee *expressly* "*reserves the right* to enact by the legislature thereof, "*hereafter*, all such laws as may be deemed necessary "to protect the interest of the State; and to secure the "State against any loss in consequence of the issuance "of bonds under the provisions of this Act—but in "such manner as not to impair the vested rights of the "stockholders of the companies."

The complainant is bound to, and does, in fact, insist that this section has no force or meaning whatever. But the established rule of construction is that every part of a statute must be considered in determining the meaning of any part, and that the ordinary meaning of the words used shall, if possible, be accepted as the true meaning.

What is the natural, the necessary, meaning of these words? Is it not that the State may thereafter pass any laws she may deem necessary to protect her against loss and secure her interest, without in any manner

consulting with any other person; provided, alone, that such legislation does not impair the vested rights of stockholders?

Or, to put a concrete case, does it not mean that though certain ways have been herein provided by which the State may protect herself against loss, yet, if the State shall, at any future time, deem it necessary, in order to protect herself against loss, she may adopt other ways; she may settle with the companies as and when she thinks it to her interest, or, if she deem it to her interest, to appropriate the debt and lien, to the building up of other State improvements, as she did with her stock in the East Tennessee & Virginia Railroad Company, to building turnpikes and railroads—or to compromise the debt and lien at a price less than the face value, as she proposed to do with the Tennessee Pacific, if, in the future, it shall appear best for her interest—or to increase the debt and lien if that course is deemed best to protect her eventually against loss, as she did from time to time as to nearly all her railroads; or to transfer the debt and lien out and out for such a consideration as she may deem to her interest, as she proposed to do to any one who would settle the debt with the *consent* of the *company*. In short, to do any and everything as to this contract which she deems her interest, and which does not impair the vested rights of the stockholders.

Record, p. 311.

It might have been to her interest, and to save her from loss, after the close of the late war, in the case of a railroad company which was unable to re-equip and operate its road, to have assigned her claim and lien to any one who would advance money enough to restore the railroad to its full usefulness, as a developer of values, as an element of taxable wealth. If the State had so considered it, can there be a reasonable doubt that she would have had the right to do so under this 12th section? Instead of doing this, she thought it best to increase the debt and lien by issuing

new State bonds, to such an extent that in the case of the Nashville & Decatur Railroad the State aid, instead of being $8,000 per mile, as authorized under the Act of February 11, 1852, was $40,000 per mile. *This is not complained of.* But when she, in 1869–70, after having exhausted every possible plan of securing herself against loss, authorizes a settlement, by which all the holders of her bonds are benefited, to wit, in the increase of the value of their bonds nearly 100 per cent., by which over $20,000,000 of her debt is canceled, and she is put in a position of ability to meet her existing liabilities; these bondholders, though believing at the time, as the State did, not only that this was the best and only practicable way to protect her interests, and all parties against loss, but also actively advising and encouraging her to enforce this plan, yet *now, ten years* after it has been done, and their debtor relieved of more than half her debt, by the investment of others, on the faith that what was done was right and proper to be done, these speculators say their vested rights are violated by said acts.

There are three suggestions as to this overreaching position:

1. It is a bare assumption that complainant had any other vested rights under the Act of February 11, 1852, than a title to any bonds which he may justly hold, and the obligation of the State that they shall be paid, and this assumption has no foundation in fact, as hereinbefore shown.

2. If he had any such vested rights, he is not in a position to assert them in a court of equity.

3. If he had any such rights, they were by the terms of his original contract, to wit, the 12th section, *defeasable*, by the happening of the events which have occurred.

If he can contract for a lien, can he not also contract for the defeasance of such lien; and if so, may not said defeasance be made to depend upon the will of another—the discretion, the judgment, the interest of another—and if he contract that it shall so depend, and that other in good faith determines the lien, can he complain?

Surely not. It is a *part* of his contract, in which it is provided that the management of this internal improvement system in the *unknown future* shall be in the sound discretion of the State alone. It is an assertion that the bondholder shall look to his debtor, the State, and shall not have the right to interfere in her control of or disposition of the security which is taken. In short, it is an agreement that the State may thereafter pass all such laws as she may deem to her interest, in relation to these internal improvement companies, and the bondholder will rely alone, as he did when he purchased his bond, on her "irrevocably pledged faith" to pay his bond at maturity.

If the State was a trustee at all (which we deny), she was a trustee clothed by the contract with power to manage, use and dispose of the trust estate, as she deemed best for *her interest*, and no one who has read her history will deny that the Acts of 1869–70 were the wisest and best means that could have been adopted to conserve her own interests, as well as the interests of all parties concerned.

So that if complainant's assumption that the bondholder had a lien be true, it is also true that its continuance depended upon certain contingencies, which have happened, causing a defeasance of such lien.

XXX.

If, indeed, the State assumed the office of a trustee, the powers of such trustee are so unusual that it is difficult to liken it to a case between individuals; but

there is one suggestion that we venture to make in this connection, and that is: If you can imagine a similar case between individuals, in which the trustee is, by the terms of the contract, to deal with the trust estate as may be to *his* interest, and he does so deal with it, the beneficiary, if he be injured, must look to the trustee in whom he reposed, and not to another party who dealt with the trustee.

If, for instance, A held a note executed by B, and upon which C was indorser, and B had secured C against loss by a mortgage on property, and all three had agreed that C might deal with such mortgaged estate as he deemed best, and he does so deal with it, and a third party obtains possession of it, it seems to be plain that A, after having authorized C to act upon his own discretion, may not disturb the title of the third party, but may compel C to account to him if he fails to pay over the proceeds.

If you attempt to liken the case at bar to a trust, you are met at every step by difficulties; the supposed trustee is a sovereign State, which can not be compelled to perform its obligations; the supposed trustee is the alone maker of the bond; the sinking fund is to be paid in the notes of the supposed trustee, and this supposed trustee is authorized to deal with the trust estate, not for the interest of the cestui que trust, but for the interest of the trustee.

The difficulty in this case is not that the trustee, in violation of her trust and in fraud of the rights of the beneficiary, has squandered the security—No, she did the very best thing possible under the circumstances, she received from the railroads or their purchasers, what was exactly the equivalent in number, amount and *value* to the bonds originally issued, a sum sufficient to have bought up and paid off every bond originally issued to such railroad. So that the State, if she could have found the identical bonds, could have sold those she received, and with the proceeds paid off

those she issued to such railroads, for all her bonds were precisely of the same value. This, however, is not the trouble, but the difficulty is that the State, after receiving from the railroads the exact equivalent of what she had issued to them, has failed to account to the holder of her bonds for what she has received.

If the bondholder could get from the State what the railroads paid her, it would exactly settle his claim. So that, in a practical view of the relations of these parties, it is not of the slightest consequence whether the State was the alone debtor to the bondholder and creditor of the railroads, or a trustee authorized to settle the debt; in either case she has received precisely in amount, kind and value what she issued, and the bondholder must look to her as his alone debtor, or to her as his trustee who has in her hands a sufficient amount to settle his debt, and in no case has he an equity against the railroad, which has once paid the debt.

Just here we call attention to the fact, that there was *no possible motive* for the railroads in their settlement with the State to pay in one bond rather than another; they were all the same price precisely; it would have cost exactly the same amount of money to buy the very bonds issued to them as it cost to buy those that were paid in, and the State, when she received those paid in, might have exchanged them for those originally issued, or sold them and bought the others. So that in any possible view of this case there appears nothing substantial in it.

XXXI.

Let us now examine the position occupied by complainant in these suits.

Did he at the time of filing the Bill in this cause own any of the bonds which he now produces? Is this a *bona fide* lawsuit? Is it a suit brought by

a complainant who has a real cause of action, or is it a suit instigated and maintained by others who are not before the Court, but who are attempting to shirk that personal responsibility to which a party to a suit is subjected, and yet with a figure-head maintain a speculative lawsuit while they eagerly wait for the spoils?

And if complainant is the real owner of the coupons sued on, is he in a position to ask the active aid of a Court of equity, to seize the property of the Chicago, St. Louis & New Orleans Railroad Company, the purchasers of the Mississippi Central Railroad?

We invite careful attention to these questions, for if either of them can, upon the facts in this case, be answered in the negative, the complainant can have no standing in this Court.

It appears that there was an organization in New York City known as "The Committee of Tennessee Bondholders" in 1870, and that complainant was the secretary of said committee in 1877-8 and its treasurer in 1879, and that one Peter Geddes, of Geddes & Smith; John T. Terry, of E. D. Morgan & Co.; Eugene Kelly, of Eugene Kelly & Co.; James G. K. Duer, of James G. King's Sons, and R. S. Moran, were of the members of said committee. Record, pp. 584-5.

It further appears that said committee is a close concern, whose secretary declines to tell its workings, or the terms of its evident though secret connection with this case. It appears that this committee has for a long time been searching out the holders of Tennessee bonds; that its members speculated in Tennessee bonds, and that they *actively urged the State of Tennessee to compel railroads to settle their internal improvement debts by returning to the State any of her bonds;* and that after all the railroad debts to the State had been settled, either by returning a like amount of bonds to those originally received, Record, pp. 576, *et seq.* Record, p. 739.

Record, p. 668. or by a sale of the railroads, this complainant begins a suit similar to this one against each of the railroads in Tennessee, to compel them to pay said debt over again.

Notwithstanding the great secrecy which this committee for some cause adopt to cover up their purposes, it crops out in a circular of theirs issued shortly after these suits were instituted, that they had decided "to adopt the suits lately instituted by Mr. C. Amory Record, p. 781. Stevens." Though said circular does not show *when* they decided "to adopt" said suits, we think it will be seen that the word "adoption" is a misnomer, and that this secret association are the fathers of these suits, and have furnished the bonds upon which each is based, and are the real parties who are maintaining them. We think it will be seen that C. Amory Stevens is a mere tool by which these speculative conspirators hope to use the Courts for their inequitable ends, while they manufacture public opinion as outsiders, and secretly covenant against that open personal liability which an honest suitor willingly undertakes, and Courts of justice always require.

1. The first suspicious circumstance is that complainant *happens* to have just enough bonds against each railroad in Tennessee to bring a suit and carry it to the Supreme Court.

It is remarkable that an honest investor in Tennessee bonds, of which about $40,000,000 were outstanding, should get some on each of the Tennessee railroads—just enough to maintain his suits.

Record, p. 17. 2. Another remarkable fact is, that when he comes to file his Bills he singularly fails to mention the numbers or letter or series of the bonds he claims to hold, or to file the same or copies thereof, or give any other information identifying them.

3. In this particular case, though the Chicago, St. Louis & New Orleans Railroad Company, the defendant, has no connection with the Mississippi Central & Tennessee Railroad Company, but holds the railroad by purchase, under decrees of sale of the Circuit Courts of the United States, and therefore could not in the nature of things know whether any, and if any, what, bonds were issued to a prior company; yet in the Bill he says: "Your orator is the owner and "holder of *six* of said bonds, being of the numbers, "dates and descriptions in all respects of the bonds "heretofore described," etc. That is, they were *six* of $1,124,000 of bonds claimed to have been issued to the Mississippi Central & Tennessee Railroad Company. Record, p. 17.

Several months after the Bill was filed, to wit, on August 12, 1879, defendant's counsel in writing requested complainant to give the number of the *six* bonds sued on, which he failed to do. The local counsel of complainant had no information of the numbers, and complainant, instead of at once on demand furnishing the numbers, refers defendant to certain other of his counsel. This counsel was applied to, and on September 12, eight months after the filing of the Bill, defendant is informed of the numbers of *five* bonds which complainant claims, but as to the sixth the counsel to whom complainant referred defendant says he had "no description of" it. So that with the utmost diligence defendant could not obtain the numbers of the six bonds claimed by complainant. (See correspondence attached to Armistead's deposition.) Record, pp. 414, 415-18. Armistead's Deposition.

4. On February 13, 1880, over a year after the Bill was filed, when complainant begins to testify in this case, instead of *six* bonds as claimed in the Bill, or five of which the numbers were given after a long delay and repeated demands, he produces *ten* bonds. Record, p. 17. Record, pp. 417, 418, 568.

Record, pp. 17, 29, 607-8.

5. In the Bill complainant says that "*a copy of "one of the said bonds and coupons is hereto attached, marked Exhibit C,*" and when we compare "Ex. C" of the Bill with the bonds produced, it is found that it is *not* a copy, literally or *substantially*, of any one of the ten bonds produced.

The difference between them is so substantial and apparent, that if complainant had owned at the time of bringing this suit any one of the bonds now produced, the mistake could not have occurred.

Exhibit C identifies the particular Act under which it was issued, to wit, February 11, 1852. Neither of the ten bonds produced identify or refer to any particular Act under which they were issued. "Exhibit C" declares on its face the purpose for which it was issued, to wit, "to establish a system of internal improvements in said State."

Neither of the ten bonds produced have any reference to the purpose for which they were issued, or to any system of internal improvements.

There are other striking differences which will be seen on comparison.

It will be observed that these differences are not such as could have occurred by careless copying of any one of the ten bonds, for the differences do not consist of omissions or slight changes of expression, but whole sentences are added; others are entirely different. Indeed, it is in no sense a copy of any bond produced.

Exhibits to Armistead's Deposition, Record, p. 414.

6. It will also be observed that complainant and his counsel, Mr. Andrews, both failed to allow defendant to inspect the bonds prior to filing its answer, though they were informed in writing that the defendant knew nothing of the issue of bonds or their use, and that it was necessary for it to inspect the bonds before filing its answer.

7. It will be seen also in the cases against the other railroads, that when complainant, C. Amory Stevens, comes to produce his bonds, they do not correspond in number or description with those claimed to be held by him in his respective Bills; for instance, in the Mississippi & Tennessee Railroad case, he declares in his Bill he had a certain number of bonds, but when his deposition is taken, he admits he had only one-half that number, and never had any more.

8. Complainant, in his Bill in this cause, says: "Your orator is likewise the holder of *seven* coupons "attached to each one of the said bonds," falling due from and including 1st January, 1876, to and including 1st January, 1879. Whereas, of the bonds produced, two have coupons from July 1, 1868, making eleven and one-half years of coupons instead of three and one-half, or twenty-three past due coupons on each bond instead of seven, and another has only four past due coupons instead of seven.

Record, p. 17.

Record, p. 609.

How could all these unusual things have occurred if complainant really owned the bonds at the time he instituted this suit?

It is impossible.

The truth of the matter seems to be that a parcel of bond speculators conceived the idea of urging the State to force railroads to settle, and after they had done so, and had issued and sold their securities, upon which they raised the means to buy the State bonds with which to pay the debt, then these bondholders make a secret league, put forward Calvin Amory Stevens to bring the suits, make the most general and unsatisfactory allegations as to the bonds claimed, and trust that before they are compelled to produce any bonds, they can, amongst hands, get together enough of each class to cover the allegations of the several bills. They knew the State had not paid

the coupons on her bonds since January, 1876, and hence it was safe to say, as C. Amory Stevens did, that he had seven past due coupons. It would not do to give the numbers of the bonds, because they might not be able to buy up the particular number; and so they concealed from their counsel facts which would have been stated if counsel had had the information, and trust that they will be able to make good their general allegations.

We see no other possible explanation of the facts above set forth.

Nor is this suggestion weakened by reading the deposition of C. Amory Stevens, for it will appear from a careful reading of his testimony, that he is far from being an open, frank, candid witness, but, on the contrary, his testimony and refusals to testify show in great prominence the keen, shrewd, secretive speculator, who is so afraid he will reveal the secret of his coadjutors that he betrays their nefarious scheme by his supersensitiveness.

With all his refusals to answer, and dodging, it is plain, from a careful reading of his deposition, that there *is* a secret league between him and his confederates, by which they are maintaining this suit, and expect to reap the benefits of it if it succeeds, and to escape liability if it fails, further than the one coupon and $5 per bond, which complainant holds as treasurer.

It is a far-reaching scheme. By advising the State to force railroads to settle "as they may now do," a large demand was created for Tennessee bonds, and of course a great increase in market value. Thus the bondholder is enabled to realize a handsome profit on the bonds he chooses to sell, for it is a fact that the bonds purchased by railroads to pay the State cost from 54 to 90 cents on the dollar; and now, after these settlements, if they can force the railroads to pay the State bonds which are still held, the profit would be immense.

In connection with the question as to the credibility of complainant, we call attention to cross-questions and answers 114 to 118, inclusive, and cross-questions and answers 121 to 123, inclusive, in which he swears that he owned all the ten bonds before suit brought, and that he can positively identify the six out of the ten bonds, upon which his suit was brought, by the numbers and color, when on examination of the ten bonds they are each of the same letter and color; and he says the list which he furnished his counsel contained the numbers of the whole ten, and that he does not know why the suit was not based on the whole ten instead of six, nothing in the bill showing which of the ten were sued on.

Record, pp. 592-3, 604.

Here, it seems, is an instance of swearing positively to a thing which he could not have known.

Indeed, the entire deposition shows that complainant has a much higher conception of his duty to conceal his confederates, and the terms of their bargain to maintain this lawsuit, than he has of the obligation of his oath to tell the whole truth.

XXXII.

If, however, the Court should conclude that this is an honest lawsuit, can it be possible that this committee of Tennessee bondholders and its secretary, after recommending that the State should require railroads to settle their indebtedness by returning State bonds, and standing by while more than $20,000,000 were being invested on the faith that it was a settlement indeed, and publicly and notoriously treating and holding out the State, while said settlements were in progress, as their alone debtor, and reaping the benefits of such settlements in the increased value of their bonds—can it be possible, we ask, that a Court of conscience will hear them now in their effort to upset these settlements?

See exhibits to J. D. Porter's Deposition, and Record, pp. 289-90, 291-4.

It will be seen from the proof in this cause that from 1852 up to 1870 all the bondholders treated the State as their alone debtor, and that from 1870 to 1878 these very bondholders were not only advised of all that was going on, but that they were actively urging the State to take certain steps utterly inconsistent with their present claim. Indeed, two of the members of this "committee of Tennessee bondholders," on the 23d of February, 1877, suggest and advise the State to *require* the railroads to do precisely the thing of which they now complain. See Ex. No. 9 to J. D. Porter's deposition, in which they use the language "that the debtors of the State" (which were alone the railroad companies) "be *required* within a resonable time—"say by or before July 1, 1877—to pay off every obli-"gation due from them to the State, *as they may* now "*do*," by the Acts of 1869 and 1870; "after which time "only *such advances* as were *specifically* made to each "to be receivable in *payment*, or cash. This to apply "to principal and interest. We submit to your Excel-"lency whether there would be any hardship or injus-"tice in *requiring this*, and assure you that the *cred-"itors* of the State," the bondholders, "would regard "such a step as one taken in the right direction." *Now* they say that such a step was one of the most iniquitous frauds which was ever known.

J. D. Porter's Deposition, Ex. 9.

Peter Geddes' office, at which this committee of Tennessee bondholders met, is in the same building and immediately adjoining the office of the Chicago, St. Louis & New Orleans Railroad Company.

On August 1, 1877, said Geddes, writes the Comptroller of Tennessee, "I think I may now safely say "to you confidentially that the parties in interest will "be prepared to pay off the debts of the Mississippi "Central to your State just as soon as it is safe for "them to do so." (Ex. 5 to J. D. Porter's deposition.)

J. D. Porter's Deposition, Ex. 5.

Now, by examining the deed to the purchasers, Ex. No. 1 to defendant's answer, and J. D. Porter's deposition, answers 48 and 49, and R. P. Neely's deposition, answers 23, 24 and 25, it will be seen that the sale of the road had not then been made, but that the Governor of Tennessee had informed those interested that the State had a lien on the road, and was anxious that the whole debt should be settled, and that he would not surrender that part of the road in Tennessee until the whole debt was settled, and that the purchaser could buy Tennessee bonds, which were then at a discount, and pay off the internal improvement debt and issue their own bonds and have them substituted to the lien reserved by Tennessee statutes.

Record, pp. 374, 775, 322-3, 282-3, 287.

So that the officers of defendant, even before the sale, had communicated to these bondholders their plan and purpose, and Geddes, one of this committee, had informed the Comptroller. Here, then, is actual knowledge of the fact that defendant was relying on the representations of the State, and on such faith intended to purchase said railroad and issue its substitution bonds and buy up State bonds, and thus settle with the State.

Record, pp. 375, 377-8.

There is no concealment, no evasion, but an honest *bona fide* reliance on the notorious claim of the State, and encouragement of the bondholders, and this fact is communicated to this committee of Tennessee bondholders *over three weeks* before the sale and purchase of the railroad was effected, *and four months before the substitution.*

On August 23, 1877, Peter Geddes, a member of the Tennessee bondholders' committee, informs the State officials "that the Mississippi & Tennessee Railroad "Company have voted to pay off their debt to Tennes- "see," and he adds, "this *practically settles up all* "*advances made by the State to railroad companies,* "*and reduces the whole State debt question to one*

J. D. Porter's Deposition, Ex. 6, Record, p. 377.

"*between the people of Tennessee and the investors in "their public debt.*"

J. D. Porter's Deposition, Ex. 7, Record, p. 378.

On August 27, 1877, Peter Geddes by letter informs the Comptroller of Tennessee, that he has "just had an interview with Mr. Osborn," (who is the President of the Chicago, St. Louis & New Orleans Railroad Company), "who reports that in thirty days the par- "ties in whose interest the Mississippi Central was "bought in the other day, will receive a confirmation "of their purchase. *It is quite well understood* HERE "that so soon as they can do so with safety *they will* "*pay off the* LIEN of Tennessee on the Mississippi "Central, and that they now think they can safely pay "it off sixty days hence.

"There is thus little doubt that the last of Tennes- "see's advances to the railroads within her borders "will be paid off early in the fall, thus freeing her, "and her creditors, too, for that matter, from a very "troublesome disorder." In the same letter he suggests a compromise with Tennessee, which recognizes her as the alone debtor of the bondholder.

The sale of the Mississippi Central Railroad was on the 23rd of August, and Mr. Geddes' letter is four days after the sale, showing how interested and well informed and active this "committee of Tennessee bondholders" were, and how they were encouraging innocent parties in going into such settlements.

Record, p. 378.

Indeed, they were so well informed that, on August 27, Mr. Geddes stated precisely the time when the debt and lien of the State would be paid off. He says: "sixty days" from the 27th of August, and the debt and lien were paid off on November 28, 1877.

This shows in great prominence, also, the fact that defendant was acting in good faith, on the representations of the bondholders as well as the State in settling said debt, and shows at the same time the awful inequity, not to say the horrible treachery, of the bondholders' present demand.

Where was complainant, Calvin Amory Stevens, all this time—what was he doing? He was the secretary of this "committee of Tennessee bondholders"—the most knowing one of them—fully cognizant of all the facts. It will be seen, in cross-questions 39 and 41, that complainant had been keeping himself "advised" generally on these and like matters, and by cross-question 73 that the object of the organization of the "committee of Tennessee bondholders" was to "keep particularly advised as to everything affecting "Tennessee bonds, and by communing together pro-"tect and enforce the rights of such bondholders," so that there can be no doubt that he knew that his two fellow committeemen, on the 23d of February, 1877, urged the State authorities to "*require*" the railroads to buy up State bonds and settle their debts, and that he also knew of every step taken by defendant in that direction, as well as the letters of his co-committeeman, Peter Geddes, above quoted, and actively encouraged them. Indeed, as will be seen, he actively took part in Mr. Geddes' plan of first getting all the railroads to settle, and then compromise with the State as their alone debtor, as his letters and dispatches show. (See Exhibits to J. D. Porter's deposition.)

J. D. Porter's Deposition.

The scheme of this committee of bondholders was evidently to make money by their speculation. The complainant claims to have paid about $400 for a $1,000 bond, and many past due coupons attached. In another instance he paid $525 each for two $1,000 bonds with ten and one-half years of past due coupons attached; that is, $525 for bond and past due coupons amounting to $1,630, or less than *one-third* of the face value.

At the time of the organization of this bondholders' "committee," the bonds of the State were at a very great discount, and the first step of these gentlemen was to suggest to the State the propriety of compelling

railroads to buy up enough bonds to settle with her. These immense purchases of course made the market buoyant, and doubled the value of the bonds held by these gentlemen. And after disposing of what bonds they chose to railroads or others at the enhanced price, the next step is to get the State to settle by issuing a new bond at par for those outstanding, with gradually increasing interest, and make the coupons of the new bonds receivable for taxes.

This complainant was identified with this committee and Mr. Geddes, when the first step was taken, as hereinbefore shown, and when the second step was under discussion, was not only identified with them but took a prominent part. See Exhibit No. 2 to J. D. Porter's deposition, where complainant and others, on the 15th of February, 1877, in a formal letter to the Governor, legislature and people of Tennessee, show that they "have carefully considered the liabilities and resources of Tennessee," and map out a plan for the State to pursue, giving six particulars as to proposed legislation, and among them commend in their second suggestion the message of the Governor, dated January 1, 1877, (Exhibit 1 to J. D. Porter's deposition), in which the Governor states the only railroads which had not up to that time settled with the State under the Acts of 1869–70, and the amounts owed by each to the State, and, under the head of "delinquent railroads," states the sales of two railroads by the railroad commissioners, and how much of the purchase money had been paid to the State, and also the fact that the Mississippi Central Railroad failed to pay the semi-annual interest due July 1, 1875, and January 1, 1876, and that he had put a State receiver in possession of it, and the further fact that said receiver had paid into the State treasury up to that time sixty thousand dollars "on account of taxes and interest."

J. D. Porter's Deposition, Ex. 2, Record, p. 351.

J. D. Porter's Deposition, Ex. 1, Record, p. 337.

And yet, with all their minute directions to the

State of Tennessee as to how she shall pay her debts, these gentlemen (complainant among them) never once intimate that the $60,000 then in the State treasury from this railroad ought to be applied to paying the past due coupons now sued on.

They succeeded in getting an extra session of the legislature called, and got a committee of conference to go to New York, and after a public discussion of their claims and the ability of their alone debtor, a proposition is made to take sixty and six instead of par. (NOTE.—The Governor, in his message of December 5, 1877, states that defendant had paid its debt to the State.) Geddes went to Nashville to influence legislation; others telegraphed and wrote, urging it. (See Exhibit No. 3 to J. D. Porter's deposition.) There was a failure to get what they wanted. But they did not desist. They began again, and had a second extra session called, the Governor's message to which opens with a dispatch of complainant, in which he proposes to take fifty and six, and asks that his proposition be submitted to the legislature. By reason of this proposition the Governor called the second extra session of the legislature. (See Exhibit 4 to J. D. Porter's deposition.) This dispatch is dated December 11, 1877, just after defendant had settled in full with the State; and, like all the other communications and public acts, holds out that the State is the alone debtor. On the 15th of December, 1877, complainant writes the Governor, mentioning two dispatches which he had sent him, and says: "Nor "can I yet believe that the legislature of Tennessee "will FORCE *her creditors* (who have offered so liber- "ally) to take less." (Exhibit No. 11, J. D. Porter's deposition.)

J. D. Porter's Deposition, Ex. 3, Record, pp. 357-8.

J. D. Porter's Deposition, Ex. 4, Record, pp. 369, 370, 384.

J. D. Porter's Deposition, Ex. 11, Record, p. 385.

On the 16th of January, 1878, complainant read, in a public meeting of bondholders in New York, his correspondence with the Governor of Tennessee, and defended his fifty and six proposition, on the ground

J. D. Porter's Deposition.

that it was that or *nothing*. (See clippings from New York papers sent by complainant, and attached to J. D. Porter's deposition.) On the 24th and 25th of January, 1878, complainant again wrote the Governor; and in the letter of 24th complainant refers to the legislature having failed to accept his proposition

Record, p. 406.

in these words: "They forgot, however, the *solemn* "*promises* which the *State had made* when *she* sought "the capital of *her* creditors to carry on those inter- "nal improvements which have enhanced the value "of property in Tennessee far beyond the amount "borrowed."

XXXIII.

Thus it will be seen that this complainant and his coadjutors—

Record, pp. 382-3, 390, *et seq.*

1. Suggested to the State to require railroads to accept the terms of the Acts of 1869–70, and settle with the State thereunder.

Record, pp. 337, 406, 375-9.

2. Were actually cognizant of the fact that Tennessee had seized defendant's railroad, by its receiver, on account of past due interest, and approved thereof.

Record, pp. 312, 313-15, 286.

3. That the State had collected the very interest, for which he is now suing, *in money* from said railroad by force, and a receiver's possession.

Record, pp. 739, 740, 742-4, 749.

4. That under circumstances which in common honesty he should have objected to such collection—or insisted upon its being paid to him—he not only made no such claim. But

See Exhibits to J. D. Porter's Deposition.

5. That he publicly, repeatedly and continuously, held out the State as his alone debtor, from whom, if he could not get his debt, it was lost.

6. That he knew the Chicago, St. Louis & New Orleans Railroad Company intended to purchase the Mississippi Central Railroad, and was relying upon the public claims of the bondholders that the State was their only debtor, and the representations of the State officials that in case they purchased they could pay off that part of the mortgage debt in Tennessee bonds of any series, which were then at a large discount.

7. That with this knowledge he stood by and saw them make the purchase of said railroad, and buy up the Tennessee bonds for that purpose, and with them make the settlement.

8. That he stood by dumb as an oyster while the State used the $110,000 in money she collected by force, of said railroad, and used it for other State purposes.

9. That at the very time the defendant was settling the State debt he knew it and said nothing to put any one on their guard, but, on the contrary, was *publicly* treating with the State alone as his debtor. Record, p. 561.

And now the question is, will a Court of conscience *actively* aid him in seizing the property these defendants bought under these circumstances on a claim that he considered the State as secondarily liable, and the company the maker of his bond, as he swears he does in cross-questions 162, 163, 164? Without dwelling on the palpable fraud of his holding out publicly that the State was his alone debtor, and that if she failed to give him fifty and six he would get nothing (and after innocent parties had with this knowledge acted on the faith that it was true), swearing that he considered the State secondarily liable, we ask, is it possible that a Court can be made the active instrument to effect this fraud? Record, p. 601.

Story, in his work on Equity, in speaking of constructive frauds, says: "In many cases a man may be "innocently silent, but in other cases a man is bound "to speak out, and his very silence becomes as expres- "sive as if he had openly consented to what is said or "done, and had become a party to the transaction. "Thus, if a man, having a title to an estate which is "offered for sale, and knowing his title, stands by and "encourages the sale or does not forbid it, and there- "by another person is induced to purchase the estate "under the supposition that the title is good, the "former, so standing by and being silent, will be bound "by the sale, and neither he nor his privies will be at "liberty to dispute the validity of the purchase. So, "if a party, having a title to an estate, should stand "by and allow an innocent purchaser to expend money "upon the estate without giving him notice, he would "not be permitted by a Court of equity to assert that "title against such purchaser, at least not without "fully indemnifying him for all his expenditures. The "same rule has been applied both at law and in equity "where the owner of chattels, with a full knowledge "of his own title, has permitted another person to deal "with these chattels as his own in his transactions "with *third* persons who have *bargained and acted* "in the *confidence* that the chattels were the property "of the person with whom they dealt; for in cases "where one of two innocent persons must suffer a loss, "and *a fortiori* in cases where one has misled the other, "he who is the cause or *occasion* of that confidence by "which the loss has been caused or occasioned ought "to bear it." "There are indeed cases where even "ignorance of title will not excuse a party, for if he "actually misleads the purchaser by his own repre- "sentations, although innocently, the maxim is justly "applied to him—where one of two persons must "suffer, he shall suffer who by his *acts, occasioned the* "*confidence* and the loss."

"A more common case, illustrative of the same doc-
"trine, is where a person, having an incumbrance or
"security upon an estate, suffers the owner to procure
"additional money upon the estate by way of lien or
"mortgage, concealing his prior incumbrance or secu-
"rity. In such a case he will be postponed to the
"second incumbrancer; for it would be inequitable
"to allow him to profit by his own wrong in conceal-
"ing his claim, and thus lending encouragement to the
"new loan." (Sections 387, 388, 390.)

So in the case of Chamberlain vs. St. Paul, etc., Railroad Co. *et al.* (2 Otto, 307), which, by the way, is in every respect a stronger case for complainant than the one at bar, the Court, in noticing the facts that Chamberlain delayed to assert his claim and encouraged the State and third parties to do acts upon which other rights accrued, say that, "under these circum-
"stances it would be manifestly inequitable and unjust
"to grant his prayer."

5 Johns. Ch. R., 184; ibid., 268.
2 Woods, 132.
12 Wallace, 683.
Perry on Trusts, section 870, and authorities cited.
Jones on Mortgages, section 603.

"There are also numerous instances in which a
"party by his admissions and representations is con-
"cluded from showing the contrary in evidence, al-
"though the fact could not have been pleaded by
"way of estoppel." (Starkie on Evidence, vol. 1, side page 296.) "It is of no importance whether" the acts or representations "were made in express lan-
"guage to the person himself, or *implied from the "open and general conduct of the party.* For in the
"latter case the implied declaration may be con-

"sidered as addressed to every one in particular who "may have occasion to act upon it."

Greenleaf on Evidence, section 207.

XXXIV.

Again, the State of Tennessee, even under complainant's new theory, was the trustee with extraordinary if not exclusive powers. The complainant holds her out as such, and sees her for many years dealing with the trust estate, and claiming the right to dispose of the lien, and not only so, but sees her actually dealing with third parties, and disposing of the lien; and this complainant neither objects to the claims of said trustee, nor warns those whom he knows are acting in good faith on her representations, but allows the settlements to be made, and his trustee to dispose of the funds realized—funds, by the way, which are largely more than sufficient to discharge all his claims—and never pretends to disaffirm the acts of his trustee until years afterward, when the parties can not be put in *statu quo*. Now, if this trustee, in what she has done, transcended her powers or violated her duties as such, it is apparent it was done in good faith, and further, that in any view that can be taken of the transaction, even now after we have had years to study the wisdom of her acts, and the true meaning of the power under which she acted, there is no one who can affirm that it was clearly a violation of her power or duty under the trust. There is such a thing as a trust or power being *helplessly ambiguous*, and in such cases, as well as in all cases where the trustee is acting with the knowledge of the *cestui que trust*, the beneficiary must (even as between him and his trustee, *a fortiori* as between him and the third party dealing honestly with his trustee) act with due diligence in disaffirming the acts of his trustee, and if he fails to do so his right of disaffirmance is gone. The

question as to what is reasonable diligence in disaffirming such acts, is determined not alone by the time elapsed, but is affected by the change of circumstances—of the status of the parties and property—of the difficulty in restoring things as they were before the disaffirmance.

Try the complainant's case by this settled rule of equity, and where is he?

XXXV.

Again, the trust, if the internal improvement Acts of Tennessee be such, provides, on its face, that the appointment of a receiver is to depend on the discretion and judgment of the Governor of the State. Act of May 7, 1861. And if appointed, he shall pay the money realized into the treasury of the State. The receiver is to be appointed by the State, and to account to the State, and the Court whose aid is invoked is to do such things as the *interests of the State* require. Act of May 7, 1861.

The lien, if it exists, *resides in the State.* And yet complainant does not attempt to make the State a party, nor allege that anything he asks is to the interest of the State, nor that the Governor fails or refuses to appoint a receiver, nor that he would be in any other or better condition if a receiver was appointed, and had collected the money again, and deposited it in the treasury of the State. But, on the contrary, he admits that he never even suggested to the Governor that he desired the appointment of a receiver. Record, p. 602.

It may be said the State is not suable (this is doubtful); but even if true, complainant ought not to have selected or agreed to such a trustee—it is a part of his contract—and if the defendant is bound by a contract in which its property may be seized by a sovereign, and it can not stay her arm;—if the courts are powerless to help or protect defendant against the seizure and sale of its property, whether right or wrong;—if

complainant gets the benefit of this contract, or by the contract is entitled to it, a benefit by which, without the law's delay, without a hearing, the trust estate may be seized, shall he not also be bound by its limitations? If complainant sits by and sees this sovereign trustee, whom he has chosen, subject defendant's property to seizure or sale, without judge or jury, and with no help in Israel; if he stand by and see this sovereign trustee take the defendant by the throat, and choke not only what is due out of it, but also that which is not due, and when it has paid the last farthing, shall he, leaving his trustee with her pockets full, and ignoring his contract, have the strong arm of the law to seize the defendant again, and compel a double payment? Shall he make this very sovereignty, which was all well enough while it made defendant suffer, the basis of his claim to recognition in a Court, under this same contract, when his turn comes?

Think of it a moment. One of the chief considerations of this contract for the bondholder (if complainant is right) was the certainty—the celerity—with which the sovereign trustee could act; the *utter helplessness* of the defendant when she did act, either to stay her hand, or recover for a wrong done it. There would be no delay caused by the railroad—no injunction, no appeal—the remedy was without the boundary in which Courts may investigate and delay; it depended on the will of one man, the Governor, and upon his speaking the word the whole power of the State rushed upon defendant's property, and violently seized it. What a great benefit. Instead of the debtor having a chance to show that the facts did not justify the proceeding, it is helpless. How much this enhances the value of the bonds, *no long suits to foreclose, no delays, no costs, no lawyer's fees.* Indeed it was beautiful and right when the bull was goring our ox; but circumstances are changed. Sovereignty is now in the way of complainant.

Shall he not abide by his contract? Does not the whole purpose and scope of the internal improvement system show in unmistakable terms that it was never intended a Court should interfere?

Could defendant have prevented the seizure of its road in 1876? Did it not offer to pay in money all past due interest and sinking fund? and did not the Governor refuse to receive it, and refuse to release the property, until all the debt, even that which was not then due, should be settled?

See J. D. Porter's deposition, questions 47 and 48.
J. L. Gaines' deposition, questions 6 and 7.
R. P. Neely's deposition, questions 23 and 24.

J. D. Porter's, J. L. Gaines' and R. P. Neely's Depositions, Record, pp. 287, 322, 282-3.

Is this contract equally binding on all the parties? Can complainant, either in law or in good faith, sit by and see it enforced against one of the parties, and then ignore such parts of it as do not suit him? The State is unquestionably a necessary party, for another reason—the whole title and lien is vested in her; how can a Court deal with this lien unless the party in whom it resides is before the Court?

XXXVI.

And again: The equity of complainant, if he has any, must be worked out *through the State.* This difficulty is illustrated in all the cases where the doctrine of subrogation obtains, and where the party through whom the claimant's equity has to be worked out has settled with the debtor. Such a settlement is an insuperable difficulty, for as the equity has to be worked out through another, and that other has no claim, the suit must fail. How can this equity be worked out through the State, unless the Court has her before it?

And if all these seemingly unanswerable positions are bad, can he, without even requesting the trustee

whom he had selected to act, rush into a Court, ignoring his contract, ignoring the discretion which the chosen trustee had, ignoring the fact that the trustee had exhausted her power and enforced the mortgage, and had the funds in her hands, and demand a different trustee—a Court foreclosure?

When he asks equity, ought he not to be compelled to bring before the Court such parties as are essentially necessary to be present, in order that the Court may do justice to all parties?

Will a Court hear him until he has that party before it who has by force of the mortgage he seeks to foreclose, already collected the money from the debtor, so that the Court, in adjusting the equities, may compel a return of what has already been paid?

There is another suggestion as to the equities of these parties. It does not appear from the proof that any Tennessee bond was ever used for the equipment or betterment of the Mississippi Central & Tennessee Railroad, or the Mississippi Central Railroad. On the contrary, it does appear that at least five hundred and fifty thousand dollars' worth of such bonds were stolen, or put into possession of parties who by a breach of trust appropriated them to their own use; so that not one cent of them or their proceeds ever went into or upon said railroad. (See R. P. Neely's deposition, questions 7 to 20 inclusive.)

R. P. Neely's Deposition, Record, pp. 279 to 283.

Whether the bonds claimed by complainant are a part of those, we have been unable to determine, for two reasons: 1, the company kept no record of numbers; and 2, complainant, as will be seen by his deposition, declined to request the brokers, from whom he claims to have bought, to furnish us any information; and it is notorious that brokers will not give any information without such request from those dealing with them. But we have the fact that large numbers were stolen; that the property sought to be charged with these bonds was never benefited a farthing

Record, pp. 597-8.

by them; that the property is in the hands of *bona fide* purchasers, who had paid the purchase money long before this suit was brought; that complainant made no effort to trace up his bonds, to show they were not stolen, though the answer of defendant charging these facts, and that complainant was not a *bona fide* holder, has long since been filed—and not only so, but complainant declines to request his brokers to give defendant such information as they have—thus cutting off the only chance of tracing them. The importance of this suggestion is shown in the fact that complainant, as an underlying equity in his case, asserts that these defendants who purchased the railroad have got the benefit of the money realized on said bonds—in the iron and equipment of said road. This the defendants deny—and the above recited facts show another reason why complainant has no equity as against these defendants or their property.

XXXVII.

We have thus gone over some of the questions involved in this case as fairly as we were able, and as deliberately as we had time in the press of other engagements, and yet we have not touched the question as between this complainant and the holders of substitution bonds, bought by them in good faith and for full value at the very time complainant was filling newspapers and the Governor's messages with his claims that Tennessee was his debtor, to whom alone he was looking for payment of his bonds; —substitution bondholders who furnished the money to enable the railroad company to settle the debt with the State in pursuance of the suggestion of Mr. Geddes and others of this "committee of Tennessee bondholders," of which complainant was secretary; —substitution bondholders whose bonds are secured by a mortgage registered before complainant

See Ackerman's Deposition.

ever purchased this lawsuit or the past due coupons on which it is founded;—substitution bondholders whom he knew to exist when he bought his coupons and brought his suit, and that they were relying on the lien which Tennessee had assigned to the trustees in said mortgage to secure the payment of their bonds. Nor do we propose to extend this argument with such a discussion; we merely call attention to the fact that neither they nor their trustees are made parties to this suit, though they are necessary parties.

In all the examination we have made of this case, from every standpoint from which we are able to view it, the conviction strengthens upon us that the whole thing is wanting in equity and fair dealing, that the claim is a monstrous fraud;—not that complainant and his coadjutors have with manly boldness and open force attempted to secure what rightfully belonged to others, but by ways none the less dangerous or despicable, they are attempting to speculate upon innocent parties who have trusted them, and to perpetrate a great wrong under the forms of law upon this defendant, which now confidently claims the protection of this Court.

JAMES FENTRESS,

Sol. for C., St. L. & N. O. R. R. Co.,

A Defendant and Appellee.

4
No. 42

SUPREME COURT U.S.
FILED
OCT 16 1884
JAMES H. McKENNEY,
CLERK.

114-663

Supreme Court of the United States

OCTOBER TERM, 1884.

CALVIN AMORY STEVENS ET AL.

On behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee, issued to Railroad Companies,

vs.

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At the very outset of this argument I wish to make clear the relation of these parties, and exhibit the nature of the transaction. The effort of the complainants is not to make this particularly clear, since, to do so, is to destroy the effect of some of their cases most relied on.

The transaction of the State with each road is this:

The State lends to each road, at par, a certain number of her bonds—negotiable securities (as held by the Supreme Court of the United States in the case of Otis v. Cullom) passing like bank notes by delivery, and which upon passing with or without indorsement, impose no liability on the party negotiating them. The company, by means of this loan, becomes *ipso facto* a debtor to the State to an amount equal to the par value of the bonds, and is

to pay to the State that sum, or as the act expresses it, is to pay the *bonds*. The company passes the bonds without indorsement, to the bondholder, and by virtue of that act of sale, is placed under no obligation whatever in regard to the payment of them to him. But the State takes a lien to secure the payment of the bonds, *i. e.*, as we say, the debt due to her for the bonds—the only debt the company owes. Complainants say it is taken to secure the payment to the party to whom the company does not owe it, and to whom it is under no liability whatever—the bondholder. We say that is taken to secure the payment to the party to whom the company does owe it; and that is the grave controversy in this suit.

Now let us take a parallel case. A bank lends to a railroad company her bank notes, and to secure the payment of "said notes," takes a lien on property; the company spends the notes and pays the debt due from it to the bank. Would it not take very strong language in a mortgage to make the company liable to pay those *notes* to the holders?

Suppose the mortgage provided in terms that this loan of her notes, having been made by the bank to the company, the lien is taken to the bank to secure "the payment of the notes." In what sense would the court read it? Can there be any man who, reading such a contract in such a mortgage, would not say that the intent was that the company should pay the debt that the company owed to the bank, and not the notes that the bank owed to the noteholders.

GENERAL SYSTEM.

But, while that expresses the relation of these parties—of each road to the State—there is another

view of this case. This is not an isolated transaction of one railroad company with the State of Tennessee. Here in the original act of 1851–2, and others soon after enacted, are twenty-seven railroad companies to be provided for, and a funded debt is to be created, amounting to at least $20,000,000, on a scale enormously beyond anything before thought of in the State of Tennessee.

Now the question naturally arises, did the State intend in this way, by the adoption of this internal improvement system, to create twenty-seven different kinds of bonds, with twenty-seven different securities, dependent, to some extent, according to the views of these complainants, upon the collaterals attached to them, as they assert in this argument, for the purpose of bolstering up the faltering credit of a bankrupt State; and therefore to have its influence upon each of the separate series of bonds, issued to each railroad, and to give to each a different value? I ask was that the object of the State of Tennessee in adopting a general improvement system of this magnificent character? If they wished to do what wisdom would avoid, they would make securities by which the depreciation of the bad would drag down the good. If the reverse, they would do as we think they have done, aggregate the whole into one mass, and avoid all discrimination of good and bad.

An isolated transaction, such as the South Carolina case, might be differently construed from this if there were no other element of difference except the aggregate and general character of this system and the isolation of that. But that was a case simply of a company bond indorsed by the State, and so different *toto cœlo*. Our experience had shown that just such bonds, which were of different

values, and which were dependent upon the value of the railroad as well as the credit of the State (and most upon the value of the railroad), that such indorsed bonds were not bonds that could be readily sold in the market. Why would that be so? One of the elements of difficulty in regard to those railroad bonds would be that every man who chose to deal in bonds would have to inform himself in regard to a large amount of local geography, and acquaint himself to a very perplexing extent with the value, resources and management of the various roads; at a time when such information was not systemized and general as now. Such was one of the elements that, I have no doubt, led to the fact that when this railroad scheme came to be adopted, the system of indorsed bonds having been tried, it was abandoned. And it was abandoned for good reasons: because those bonds were more difficult to negotiate in the market than straight State bonds.

Then I maintain that there was, in this general system, no intention on the part of the State of Tennessee or of her wise legislators, to make a system of bonds which would require of every buyer of a bond to inquire into the nature of the collateral by which it was secured as well as of the original ability of the State.

Allow me, just at this point, to call attention to the testimony of Mr. Terry, one of the complainants in the case:

Q. What security on property did you think you were acquiring by such purchases (of Tennessee bonds)?

A. The security of the railroads—first mortgages.

That is the testimony that complainants bring forward here to show that this man was an innocent purchaser of railroad bonds, and that he bought

with this element of value in his mind. I would like for the court to look at the list of bonds that he has purchased. I would like for the court to take that list and take the markings which we have made upon it, to show how difficult it is for the most distinguished financiers, with this element of value distinctly in mind, to ascertain which are valuable and which are not; I would like you to look and see how many bonds there are of the Rogersville and Jefferson Railroad. But take the list and you will find by an actual count that at least one-half, and perhaps two-thirds—nearly a whole page of them, without a break—bought by this distinguished financier with that element of value in his mind, were bonds of roads that are utterly insolvent; and as to which that valuable portion of his security was utterly worthless.

I ask it as a plain question of common sense, Can it be attributed to the State of Tennessee, upon the use of a little, minute microscopic word in an act—can it be attributed to them that in so grand a system of credit it intended to get up a scheme that would complicate the securities and render it impossible for any one, even though he might be a distinguished financier like Mr. Terry, to ascertain what was the real value of his bonds? I believe the government of England went to great expense and trouble for the purpose of consolidating all her debt in what has since been denominated "consols," largely for the purpose of simplifying it and to prevent the confusion that results from various and different and complicated securities.

TWO THEORIES.

There are two theories in regard to this case, and the truth of them is to be tried, in some degree, by

the wording of these acts, but they are to be tried also by all the indications which the record affords.

One theory is that the lien of the State on the railroads and property is for the security of the State. The other is that it is for the security of the bondholder. We assume that it is not, at least primarily so, for both. In some sense it would operate for the benefit of both. It is intended either to secure payment to the State, or if it provides any security to the bondholder, then to him only as a means of securing the State; or it is intended to secure the bondholder, and to make the indemnity of the State a mere incident to that primary object. It is not to secure both primarily —if it is to secure payment to the bondholder, then it may be well to reflect for a moment before we begin the examination of the facts in this record, and see what are the indicia we should naturally look for in proof of such an intention.

INDICIA ANTICIPATED.

At this point it would be very natural for us to look for a cause for such an intention. Complainants allege in their bill that one of the causes was, that the credit of the State of Tennessee was not of a first-rate character and it needed strengthening. In the argument that has been made the same idea has been put forth. If that intent is to be found, then as leading to it, we may expect to find that there was distrust of the ability of the State to float a loan, on her own credit only, and anxiety on her part to bolster it in this unusual mode; and such an aim will crop out in the action of the promoters of this scheme, when they set it forth and present its difficulties and its merits. If they do not point out any reason why it is necessary to fortify the credit of the State, we might

begin at the outset to suspect the theory and to doubt if the intention really existed.

Of course if we find that there is a solicitude manifested about the ability of the State to float her loans, it will be studious of the means of making its *inducements* to the debtor or bondholder very plainly manifest to him.

Our brethren, in their brief, have upon that point said, that it must have been anticipated that the vast system then inaugurated could not be carried to success unless every practicable security which might give credit to the bonds should be *offered* to purchasers. The Court will see that there is a good deal of the word "*offered*", presented, shown exhibited, offered. It would naturally be blazoned on the face of the act itself. It would be made prominent upon the bonds. The terms in which it is couched would not be doubtful. The rights of the bondholders would be set forth in plain terms, and would not be left to uncertain implications which took nearly thirty years to grow into shape and to take form, where they could be seen in any degree to influence the actions of the country. If this is to be *offered* to him, his remedies will be clearly pointed out and explicitly declared; and his instrumentality in putting them in motion will be clearly stated. His right to the fruits of any litigation or other remedy will be studiously freed of doubt. I call the attention of the court to the opinion of Mr. Justice Bradley in the Florida bond cases. This shows the model that a legal mind, desirous of expressing an intention to offer a security to the bondholder, would have formed. He says:

The statutory lien was given to the State, valid as a first mortgage, duly registered, on the part of the road for which the State

bonds were delivered and on all the property of the company appertaining to that part of the line which it might then have or thereafter acquire, together with the powers and franchises, etc.; and on failure of the company to pay either principal or interest for twelve months after date, the Governor was empowered to enter and take possession of said property and franchises, sell the same at public auction; and it was directed that all moneys arising from such sale should be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State, or if the bonds should not be presented, to be invested and held by the State of Florida as trustee for the bondholders, until they should demand the same, and then to be paid to them by the Treasurer.

There the security of the company was *offered* in the act itself. It was necessary, the complainants say in this case, and therefore it was done. We say it was not necessary, and that it was not done.

I would say further, that if we were looking for these indications beforehand and settling the principles upon which we would decide such a question, we would say that, in the issue of the bond itself, the holder's rights would be declared on the face of the instrument, and the connection of the collateral with the instrument would be clearly shown. Such a feature is conspicuously absent from this case. If a railroad is pledged for particular bonds, the fact, we would say, would certainly be shown upon the face of those bonds. And then we would say further, that the feature would be advertised, and these securities would be discussed and compared in that aspect. The bonds of the Louisville and Nashville Railroad Company, whose stock once sold for about 150 to 160, would be preferred to a bond that had been issued by the Rogersville and Jefferson Railroad Company, whose stock is worth largely less than nothing. We say further, that as another result of this, these bonds in the market would differentiate themselves, and would conse-

quently be quoted at different prices, and that the published record of quotations would show it. Then we would think beforehand—perhaps, it is too late to form such a conclusion now, after hearing complainants' counsel talk about it—we would think beforehand, that until the State had issued all her bonds, she would assume a very solicitous care not to interfere with the securities, or to appear to deal with them except in the most scrupulous manner. We would expect further, that a bondholder would be exceedingly watchful of the security which he valued so much, and which was presented—*offered*—to him as the reason why he should buy these bonds; and that he would at least take some care of it, at some time shortly after the interest had accrued to him; and that he would be exceedingly jealous of any intermeddling by the State or the companies, calculated to prejudice his rights, or to lead to any future encroachment.

On the other hand, if we are to have a security to the State, and for the benefit of the State, we would expect to find bonds taken by the investor on the faith and credit of the State, and that they would look that way on their face; we should expect to find the promoters of the scheme solicitous for the security of the State, the bonds showing the liability of the State alone, the security not set out in the bond, perhaps the connection of the railroads with the particular bonds unheralded on the bond or otherwise, and only shown incidentally, or capable of being shown, as my brother Baxter said in the argument below, in a "well-bound book," a thousand miles away from the market in which the facts were to be ascertained, and where it is certainly exceedingly difficult to find out the facts, as we may infer from the unfor-

tunate character of the investigation made by Mr. Terry for that purpose. A better illustration can hardly be found.

We would expect further, that no solicitude would be felt by the companies or the investors about particular bonds issued to particular roads. We would look for equality in price, uniformity in quotations, indifference to the dealing of the State with her own securities, and no special care taken by the State to consult the investor as to his wishes in taking steps as to the lien. The lien declared in favor of the State and for her benefit without any express declaration of any trust; solicitude to prevent conflicting liens or the interference of any other in the management of the mortgaged estates; remedies for the State to be administered by her or her officers; none provided for the bondholders; payments to the State and credit thereupon, and payments in such effects as will be available to her, without special reference to their availability to the other party, or to the question whether they will answer his purposes. On this hypothesis the State will deal freely with the liens as her own, consulting the companies and preserving only the rights of stockholders; increasing or diminishing the charge and the security; altering the times and disposing of the funds. We will also find the bonds a homogeneous mass in value, without reference to the comparative value of the several roads to which they have been issued.

Now, as shown in the complainants' briefs, they regard some of these indications as weighty, and they seek to show that there was some solicitude about offering these bonds. By such indications as these, if this be the true test by which we are to arrive at the intent of the Legislature, we shall

get at a satisfactory decision of this whole perplexed question, at least if we find all these indications on one side, or inclining to that side by "a very large majority." I assert that scarcely a fact can be found in this whole record to favor one theory, and scarcely a fact adverse to the other. Of this whole array of "indications" which we have a right to expect on the one side or the other, not one will be found favoring the view of the complainants that this is a scheme to provide a bondholder's security. Every one will be found to favor the view that it was provided to secure the State.

COTEMPORARY DOCUMENTS.

First, the promoters of the schemes were, as far as we can trace them, chiefly the executive officers of the State, and the evidence on which we rely for their views is found in their messages to the Legislature—documents contemporaneous with the acts and above all suspicion of fabrication. These show, first, a confidence in the ability of the State to float a loan on her own credit, and grounds for that confidence; second, a solicitude to secure the State only, and not the bondholder, against loss. See the message of Gov. Neil S. Brown, October 5, 1849 (Respondent's Compilation p. 110), where, referring not to this raiload scheme, but to one that was advocated at that time and carried into effect the next year, he says:

> And it is gratifying to our pride of character as a people, that hitherto all our engagements have been promptly and faithfully met. The credit of the State has hitherto escaped any reflection either at home or abroad.

Gov. Trousdale on October 9, 1851, Id., p. 119, says:

> Should the credit of the State not be impaired by the issue of bonds to an amount beyond which it can safely go, the bonds will sell in the market for a premium, which might be applied in payment of interest.

That is in his message to the session of 1851–2, the very session that passed this measure. Gov. Campbell, who was inaugurated as Gov. Trousdale went out of office, on the 28th day of November, 1851, recommends aid "to any needed extent which "will not seriously embarrass the State of Tennes- "see or cripple her credit."

This recommendation is followed by the act of February 11, which provides that none of the bonds shall be sold below par, a clause showing confidence in the State's credit, and a resolute purpose to maintain it. The solicitude manifested here is not that bonds cannot be sold without collateral security, but simply lest depreciation may befall if excessive issues occur.

These messages show an earnest desire to secure the *State* against loss.

In the message of Gov. Trousdale, October 22, 1849, p. 113, this passage is found:

I feel it my duty also to recommend that before embarking the credit of the State in any work, you satisfy yourselves fully that the work, when completed, will yield a fair profit upon the capital invested, and as the best guarantee on this point, that the State shall only come forwrrd with her aid after individual capital has been embarked to such an extent as to *insure the State* against ultimate loss.

In the message of October, 1851, it is said:

We are all satisfied of the benefits which would result to the State from a well-organized system of railroad communication. But the great question is, can the State safely extend such aid to individual enterprise, as well as accomplish this desirable object? * * * Perhaps the better plan would be to grant liberal charters to companies. * * * Let them, by their money and labor, prepare the road for the rails and fixtures, and then call upon the State for aid. Should it appear from investigation that the improvements thus made, when finished, would be profitable, let a lien be taken *by the State* upon the whole stock of the company in the road as completed, and upon the rails and fixtures, *to save the*

State from loss; then let the State *loan her credit in State bonds.* * * * In this way works of internal improvement may be constructed and put in operation, which would defray the expense of building and enrich the individual stockholders, and the State be subjected to no cost, and but little risk in the aid she offers in the construction. I recommend to your favorable consideration each of the roads specified above as meri ing all the aid the State can safely give, while at the same time the *interest of the State should be strictly guarded,* and all necessary steps taken *to secure her against loss.*

If the Governors who were studying this scheme had had their minds as full of the bondholder and his security as they were of the security of the State, do you not think it would have cropped out somewhere? Would it not have shown its head somewhere in the course of these proceedings, in this act or in the bond; or some other where have made some mark or sign that would be unmistakable? Complainants say they have got a sign. It is a very dim one.

Gov. Campbell, October 28, 1851, says:

It does seem to be a high duty of the State to loan her credit, at least towards ironing and equipping the roads, after they have been prepared for the iron, *upon ample indemnity by the individual stockholders against loss,* and to any needed extent which will not seriously embarrass the State Treasury or cripple her credit.

In a protest of certain members of the Legislature in 1851 (page 208 of respondent's record), I get a trace of the legislative intent. There is much very excellent matter there, of which the following is a short extract. It says:

The State of Tennessee, from an overweening regard for her credit, has for years permitted her fear of debt to restrain the spirit of enterprise which has characterized many States of this Union. She has been too long torpid and indifferent to the objects of her true interest, but, under the wholesome influence of the example of her more spirited and enterprising sisters, by the arguments and persuasions of her most gifted sons, and by the sober second thought of her gifted yeomanry, she is at length aroused, and through the messages of the late and present Gov-

ernor, declares to us that she is now disposed to see her Legislature devise and adopt a liberal and judicious system of internal improvements, and that she is disposed, when individual means and enterprise have gone ahead and prepared the local work of important lines of railway passing through her territory—enhancing the value of her soil, swelling her revenue and contributing to the comfort and prosperity of her citizens, as a generous sovereign enjoying the eminent domain of this fruitful land—to loan her credit to enable such companies to iron and equip and set to immediate and profitable work the various important roads which may be deemed by Legislative sagacity and prudence worthy of such aid, and by their *prospect of profit and proposed mortgages, will secure the State against* liability to loss. Acting upon this as a governing principle, the undersigned, with a full appreciation of the East Tennessee and Virginia Railroad as one of our great projected thoroughfares eminently worthy to be included in the provisions of a general bill, have been unwilling to favor this or any other application for extra aid outside of that contemplated for important lines which may be embraced in the general bill; for it is the local work done by individual means and enterprise in the preparation of the road-bed for the reception of iron and equipments that constitutes the basis of *security for the advancement of State aid,* and if the means of the State are to be asked and obtained to assist in this preliminary work the *security is lessened,* and for this reason the example should be avoided.

In this connection, our learned brothers furnish us a very great addition to our collection in the report of Dr. J. G. M. Ramsey, the Commissioner to sell bonds under the act of 1851, the report being made on the 20th of September, 1851, immediately before the messages that I have read.

Let me say a word, before bringing that to the attention of the court, in connection with a very curious idea that complainants' counsel seem to entertain, of the period at which the act of 1852 was passed. We have been fortunate enough to find the various documents above quoted relating to that period. As a piece of contemporary history they give us a message of Gov. Jones in 1841. It is certainly true that he presents a mournful picture of things as they were about that time, but

the act of 1852 was not passed at that session. In 1845 the country had not recovered from the pressure which industry and credit for years had suffered, and the internal improvements of the State up to that point had been a disastrous failure. But the act of 1852 was passed ten years after the first message they have cited in regard to the financial condition of the State, and six years after the second message.

The only thing they have that is at all contemporaneous with this legislation is the matter to which I am now going to allude, Dr. Ramsey's report. Dr. Ramsey acted under the statute of January 30, 1850, session of 1849–50, to which the message of Gov. N. S. Brown was sent. That act "for the "encouragement of internal improvement" did pass,

It is found in our compilation pp. 60, 62, 63, and contains in section 15 the same substantial provision for statutory lien without deed which occurs in the act of 1851–2.

By it the express conditions are that upon the issuance of the bonds, the road, etc., shall be and is by force of this act *vested in the State* for *the security* of the State *against* the payment of the *debt authorized* by this act and the interest thereupon accruing.

Again, it may be well to explain at this point that up to the year 1848, the bonds of the State were issued bearing five per cent. and five and one quarter per cent. interest, and that no six per cent. bonds had been issued until 1848, within three years of Dr. Ramsey's report. Let me call the attention of the court again to that report. It is one of the important indications of the state of things that

existed then. He says: and this fact last stated in regard to the five per cent. bonds is in explanation of his statement:

> By inquiries there (Baltimore, Philadelphia, New York and Boston) I ascertained that Tennessee bonds had heretofore generally been sold below, and had rarely reached par.

They bore an interest which was $16\frac{2}{3}$ per cent. below the usual rate, and were, therefore, of considerably less value than the ones that he was presenting. He took the earliest opportunity during his visit to the North,

> to exhibit to the brokers the very favorable condition of the finances of Tennessee as presented in the last report of the Comptroller of the State.

He then goes on to show the condition of these railroads, and he has a lien exactly similar to the lien complainants have; but, unfortunately, it never occurred to him to mention the fact the bondholders had a direct lien upon the road. There is nothing of that sort stated expressly in this report, but, on the contrary, he states that, even in their unfortunate condition, the railroads were yielding three per cent. to the revenues of the State; and that the inference might be legitimately drawn that when these works were completed they would divide, at the lowest calculation, six per cent. upon the cost of their construction. Now what was the result? He goes on to say:

> From these representations, and others of an analogous character, I succeeded in raising the value of the bonds and was able to sell the amount needed previous to January of this year at a premium—the rates of sales made up within that time ranging from 103¼ to 104½. Early in this year I went forward with an additional supply of bonds. In the meantime the condition of the money market had materially deteriorated. The prices of the great American staple had suddenly gone down.

He was forced to sell at a rate below his first sales, but still above par.

In June I carried forward the remaining bonds. The depression since that time increases, and still continues and affects the quotations of other issues of Tennessee bonds below par. The stringency in the money market has, I hope, reached its crisis, and I may be able to effect sales of remaining bonds so as to realize an advance, at least, upon a portion of those unsold.

In his deposition, which is to be found in this Record, he states two important facts: that he sold all of these bonds, none of them below par, before the first of January, 1852; and further, that in no part of his negotiations did he ever mention or represent that the bonds were secured by any statutory lien in favor of the bondholders, nor did any broker ever ask him such a question. He also states further that, during the year 1852 the prices of Tennessee bonds were: In February, 102; April, 105; May, 92; June, 110; July, 92; December, 106.

The reason for the apparent discrepancy in quotations of these bonds is, that the bonds quoted at 92 were five per cent. bonds, and they would naturally and inevitably bring a lower price in the market.

This report is the only contemporaneous document our opponents could find in their industrious search; and they then call the court to follow them to 1857 and 1859 to see what Governor Harris and Governor Johnson say, at that time, in reference to the then condition of the State bonds. These messages were sent in five and seven years after the act of 1852, and at a time when the finances of the country were greatly disturbed.

EIGHT ACTS OF 1852 FOR ISSUE OF BONDS.

The suggestions of these messages of 1851 were followed by two acts which we regard as intended to embody and carry out the views of the executive department, and which, according to our read-

ing of them, exactly and fully give effect to them. These are the acts of January 15, 1852, Chapter 72, and of February 11, 1852, Chapter 151. There were six other acts passed during that session of the Legislature, giving State aid by means of the issue of bonds, two of them not to railroads, the other four to railroads. I state that specifically, to bring to the mind of the court more distinctly and clearly the point that it is actually impossible, simply by a general reference to the Acts of 1851–2, to ascertain that a bond was ever issued to a railroad company at all, and that it was impossible to tell which of the eight different acts on the subject of the issue of bonds it was to be referred to. So that a man, with all the acts before him, would have been unable, from the acts and the bonds, to ascertain under which act the bonds were issued.

These two acts of January 15 and February 11, 1852, were in progress at the same time, and an examination of them shows that the 7th section was evidently taken from the later act and inserted in the former act, for it distinctly appears that the act of February 11 was introduced early in December, and with that provision in it, and the other act was introduced without that provision. About the 16th of December, an amendment was introduced into the act which was first perfected and passed, the act of January 15; and it is in the same words, or almost identically the words of the 7th section of the other act. That shows how intimately the two acts were connected.

WORDING OF THE ACTS.

It is not pretended by us that these acts are perfectly accurate and unambiguous expressions of the legislative will. Legislative style is not remarkable for perspicuity at best, and style at the best is marred by many equivocal phrases.

These acts, though containing some things that are perplexing and subject to misconstruction upon their mere language, are, nevertheless, full of indications of the primary intent to protect the State, and wholly barren of any indicia of intent to protect the bondholder save here and there an equivocal expression, capable indeed of being construed in favor of that view, but not in that view to be reconciled with the general tenor of the things to be done, the times and modes of payment, and the medium in which the payment is to be made.

ACTS OF JANUARY AND FEBRUARY, 1852, COMPARED.

I will not take the time of the court to compare critically these two acts of January 15 and February 11, 1852, and run down the parallel columns which the counsel on the other side has furnished us.

It may be observed, however, that in the original draft of the first act, the 4th section provides for a receivership to be created by the courts. In the legislative mill that provision is bolted out and disappears, and this shows that the preference given to the other summary mode was deliberate.

The 5th section of that act also corresponds with the 12th section of the act, chapter 151, and contains the same saving of the vested rights of the *stockholder*, with the same absence of any allusion to the *bondholder*. It also contains a provision that, to my mind, is not very material—a reservation of the right to provide for a more *speedy* payment. I cannot conceive that this adds anything substantial to the general provisions of the 12th section of the other act, which authorizes any change that may be deemed necessary, and would include acceleration of payment; and I can conceive of no other reason for leaving it out than that it was

thought that the general provisions of the 12th section were sufficient to cover it.

If the mind of the draftsman of this instrument, if the mind of the Legislature, had been full of this thing—the bondholders' security—if it had had *any* lodgment there, it would have cropped out with clearer indications than are to be found anywhere in this act. The old adage that "murder will out," is a striking statement of the fact that when the mind has a thing it, and either orally or otherwise, goes to speak, it will let out what is there. It requires a great restraint to withhold what the mind is filled with. (See Lieber's Hermeneutics, ch. 1, § 2.)

If the idea of complainants' counsel had been the idea that was in the mind of that Legislature of 1851–2, as certain as that we have these suits here at all, it would have cropped out in the mention, somewhere, or somehow, in some way, of the bondholder whose rights were to be protected. But his name and his designation are conspicuously absent from the whole act. From the beginning to the end of it, no such word appears.

The first section of this act provides for the amount of work to be done by the company as a basis of credit, and the amount of stock to be subscribed. Then it provides that the Governor shall be satisfied that the road is not subject to any *other lien* than that in favor of the *State*.

Then it makes the bonds payable at the option of the president of the company. They were all payable in New York, I take it, from the fact that that place of payment is printed upon the face of the bond, and so must have been engraved upon the plate on which they were issued.

Section 2 follows and fortifies this, and shows how much this security of the State was in the mind of the Legislature. It seeks to make it certain that the road is ready for the iron by requiring that the "*bonds* shall not be used for any other purpose," than the purchase of iron, and provides for a commissioner to see to that and any other matter where the *interest of the State* may require it.

Section 3 provides for the lien; and the first observation to be made upon it is that it *creates* the lien as soon as the bond issues to the company, and "the *State upon the issuance of said bonds and in virtue of the same* (*i. e.*, issue)[1] shall be invested with said lien or mortgage for the payment by said company of said bonds with the interest thereon as the same becomes due."

Observe the State is invested with the lien before the interest of any other party has come into being. It is true it is said to be for the payment of the bonds, but as the payment could only be to the State or to the company itself at that stage of the affair, it must be apparent from this that a payment to the State is meant. If the bondholder was to be paid by the company one indication would have been that the lien was to arise on the negotiation of the bond. A bondholder's lien can not arise on the issue of the bond. But the only lien provided for by the act arises then, and no other arises afterwards or vests afterwards, and no other interest is mentioned as coming into esse afterwards.

I admit that there is a very good reason why it should still arise on the issue of the bonds to the company, because the company may misuse it, but

1 Not in virtue of the bonds. They exist before issue. Grammatically it is "same issue," not same bonds.

it is an indication harmonizing with all the other indications in this statute, and pointing in the same direction. An equivalent expression in the fourth section is for the payment as *provided in this act*, and this again meets its parallel in the last line but one of section 5, where it directs the issue of a warrant to pay such interest as the company has not provided for "*as provided in this act.*" (Respondents' Compilation, p. 184).

Now the complainants' counsel say that these words "as provided in this act," refer to the "said bonds;" but, although I admit that it is not a very strong indication, "said bonds" is as specific as it can be made, because "said bonds" are the bonds the issue of which is provided for in this act. If these words are to have any practical use and application, such as is required by the general rule of construction, then it must be to *payment* "as provided in this act" which is meant, because the payment has nothing else by which to render it certain. "Said bonds" renders the bonds certain. But the "payment provided in this act," if payment of any other kind is conceivable as being meant here, gives to those words a use and an application which otherwise they would not have at all, but would be mere surplusage and verbiage. But the like expression is repeated in section 16, where there is no room for equivocation on the arrangement of the words. There the lien is to continue "until said bonds and interest are paid as heretofore provided." Observe further that in the original draft of the act of February 11, 1852, Comp. 132, 3, the phraseology is "for the payment of said bonds," without the as "provided in this act," so that was deliberately and considerately inserted.

The only provisions in the act in regard to payments to be made, are regarding payments to be

made to the State, of interest fifteen days before they are due to the bondholders, and of the principal, years before, under the 7th section of the act, under the name of a sinking fund.

BONDS CONSTITUTING A LIEN.

The logic of the bonds *constituting a lien* which therefore goes with the bond is something that savors of refinement. The statute says as soon as the bonds shall have been issued, they shall *constitute* a lien.

A verbal examination,—an examination by a lexicographer,—shows that the only sense in which that word "constitute" can properly be applied here, is in the sense of "create." These gentlemen say that it is used in the sense of "form,"—it shall "form" a lien. But when your Honor comes to look at the definition as given, you will find that it means, not "to form" by itself, but that, in connection with something else, or several things together, "constitute" means "form a part of." In other words, I believe this is the illustration given by Mr. Webster: that "oxygen and hydrogen constitute water;" they are the constituents of water. But when you say that a particular thing is to constitute something else,—that a bond is to constitute a lien,—the only sense (when you come to look at the dictionary) in which you can reasonably read that is that it shall "create" the lien.

For the purposes of this argument (for it will not turn on the niceties of a definition in any event), whether you say that the *bond* creates the lien, or whether the *issue* of the bond creates the lien, to my mind is a matter of indifference. The lien is created upon the issue of the bond, and that is all that the word "constitute" means.

The complainants say that the bonds shall *be* a lien or a mortgage without deed (that is the sense they give it) for the payment of the bonds. According to this idea, the bonds shall be a mortgage to secure their own payment. No one ever understood it so, or they would have framed and printed the bond as a mortgage.[1]

If the bond is a lien, and that lien is vested in the State, where is the bond? This, I think, is puerile stuff, but it is to meet the *argument (?)* on the other side, and I think it fully meets it.

The complainants' brief, p. 176, insists upon the fact that the code uses the words "shall be a lien" in regard to judgments, etc., and puts "be" as an equivalent to "constitute". Now, this suggests an illustration which is valuable, though to the argument it is used to support "is not worth a flie."

A judgment is a lien. Now, suppose I sell that judgment to A and take a security for the payment of the price he is to pay me for it, which lien passes to the holder of that judgment when A passes it to B. Which—the judgment lien or my lien for purchase money?

Can it make any difference if I, who sell the judgment, am myself the judgment debtor, if I have confessed the judgment for the purpose of selling it? Would not the buyer's lien be on my property and my lien be on his, and when the lien on my property had been lost on personalty by the lapse of a term and on my land by the lapse of a year, would not my lien still subsist for my benefit,

1 In the language of Judge Withey, "the contract between the State and the company is that the State shall have a lien "for the payment by said company of said bonds," but it is nowhere required by the State, and therefore not assented to by the company, that the latter shall pay *to the bondholder*."

though the buyer's lien should be lost? That is what has happened here, with the exception that the buyer's lien has never existed, instead of being lost by lapse of time.

The repetitions of this lien occur to a wonderful extent in this act, and they are uniformly and constantly to the State. See Messrs. Postons' Brief, page 44. Nowhere in it is any trust recognized or any obligation stated in the law, as imposed upon the State with reference to the specific fund paid in by the companies; but the payments were always to be made in the State's own bonds, a medium wholly unavailable to the bondholder, and wholly incapable of supporting a trust. How different it is in the Florida cases, where everything is specific; where, in one sentence, the State is declared to be a trustee; the thing is declared to be for the benefit of the bondholders; and provisions are made by which the bondholder is to get his money; and if he does not call within ninety days to get it, it is to be invested for his benefit, and whenever he calls for it, he is to have it. His name occurs, and his rights are provided for in a way in regard to which there cannot be the possibility of mistake. That is one of the cases that the counsel on the other side cite as a strong case where a construction has been given in favor of the right of the bondholder, when it was impossible to have got away from it if the judge had shut his eyes and done his best to get away.

There was no need of any promise or obligation upon the part of the State of Tennessee in regard to these bonds, collateral to the promise of the bond. If the State could be bound, the bond was the obligation that would bind her. The primary obligation was complete, upon the part of the State,

to pay the interest. That was provided for by the act itself as a demand upon the treasury. Whether the company paid or not, the Comptroller was to issue his warrant to draw the money from the treasury.

A good deal of innuendo is indulged in in regard to the good faith of the Legislature in this respect, because the ordinary revenues would not pay all the interest. It was in contemplation of that act that these companies would be able to, and would, and in fact, they were, able to and did pay the interest in the ordinary and normal state of affairs. It was only when the war came, and when everything was disordered in the State, that there was any difficulty in regard to it. The complainants' counsel themselves admit that, up to the war, there were no defaults in the payment of this interest on the part of the State. So that, in point of fact, it was intended to be an adequate provision, and *was* an adequate provision, and unless some great calamity befell the finances of the State, there was no need of any further provision.

The 3d section provides for a lien on the first section of the road.

Section 4 provides for the opening of the lien as each section is successively aided by the issue of bonds, and finally for the lien on the whole road. Its most material provision in respect to this argument is, that all liens to all others shall be void *as against the State.*

It is expressed in the most ample, full and careful manner in the act itself, "as against the lien herein secured to the State," is the expression.

And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create or convey to any person or persons or body corporate what-

ever, any lien or incumbrance or mortgage of any kind, which shall have priority over or come in conflict with the *lien of the State* herein secured; and any such lien, incumbrance or mortgage shall be null and void *as against said lien or mortgage of the State*, and the said *lien or mortgage of the State* shall have priority over all other claims existing or to exist against said company.

It just bubbles over and bubbles over every time it is mentioned. The *security of the State* is so full in the mind of the draftsman that it bubbles over and repeats itself every time it comes up. Where was the bondholder in the contemplation of the man who drew that bill—of the Legislature which passed it? Absent—beyond the range of human vision.

Complainants' claim in this behalf is one that would be fatally at variance with the idea of the Legislature on that point, and with every purpose they manifest. Just think of this case as an illustration. Suppose that it was a bondholder's lien, and that the bondholder had a right at any time to file a bill to interfere with the proceeding of the State in dealing with it; that every bondholder of every little road in the State of Tennessee, that every bondholder of all these twenty or twenty-five millions of bonds, had a right to interfere and assert his lien by vexatious and litigious proceedings for the purpose of interfering with the management of a great State in a matter of finance that involved more than all the other matters of finance and all other financial questions in which the State had ever been or ever would be involved. Is it possible that, upon the construction of "constitute a lien," such consequences are to be deduced and to be enforced in a court of justice? It does seem as if that is something a court could never entertain.

SPECIAL PROVISIONS AFFECTING CONSTRUCTION.

We have all had occasion to remark how much more significant of intent are the tangible things *to be done* in connection with a contract or a statute, or, as Judge Strong says, the *means* by which it proposes to accomplish that intent, than the mere words which are used (9 Otto, 56).[1]

To my mind the means by which an act is to be carried out are like the locative calls in a grant, which refer to places and natural boundaries, visible to the naked eye, and which can be followed by an unlearned man as well as by an expert with his compass, affected by no variation, and subject to no uncertainty; these always control calls for course and distance, which are less obvious and certain indications of the intent of the surveyor.

FIFTH SECTION AS TO INTEREST.

The 5th section provides for the time when the company shall pay the interest or deposit with the fiscal agent of the State the money to pay, and this time is fifteen days before the coupons fall due.

On failure the Comptroller is to report to the Governor, who appoints a receiver, while the Comptroller issues his warrant to pay the interest.

The moneys collected by the receiver are to be paid "over under the direction of the Governor towards the liquidation of such unpaid interest."

This has been supposed to indicate a payment to the bondholder. But when the scheme of the act is further examined the slight indications of the wording is overweighed by a *heap* (*cumulus*) of

1 Quando charta—When a deed contains a general clause and afterward descends to special words, consistent with the general clause, the deed is to be construed according to the special words. (8 Co., 154).

indicative facts and things about which there is no room for doubt.

The last thing provided in the section is that the Comptroller shall draw the money from the treasury to pay the bondholder. This though arising last in the mind of the legislator and draftsman is by no means so in the sequence of events. Nor is it so in contemplation of the act. It seems that the draftsman, in looking over the preceding parts of this section, would at once reflect, this is a good security to the State, but it does not pay the interest.

Just there the provision in regard to the payment of the interest comes in. He has provided for its collection, but he must have seen the minute details that would have to be carried out before anything would be realized in the way of interest; and, seeing that, he says, "this does not pay the interest;" and he proceed at once to provide for it. Thus the last thing that occurs to his mind, but really the first thing to be done, is that the Comptroller shall draw his warrant. He did not say even that if the said receiver shall fail, within the said fifteen days, to collect a sufficiency of money to pay this interest, that then the Comptroller shall do it, because it was apparent at once, and without any such statement, that it was impossible he should so collect. He assumes the failure, and he provides for it without any preliminaries in that respect. At that time, fifteen days was little enough to transmit the funds to New York to meet the interest.

The treasury payment, then, last in order in the mental process of incubating a bill, is prior in point of time to the slow accumulation of a fund by a receiver's earnings; and the payment *towards the liquidation* becomes a *payment to the treasury*,

upon the second thought of the legislator, if not so as originally penned. It is this final intent that is the real intention that shall govern. It did not at all enter into the legislative mind to provide for the failure of the State to pay, by saying that the money paid in by the companies shall be paid upon the identical bonds issued to the respective companies. The idea of such a failure had not entered their minds, but there was such a proposition either at that session or a previous session, and it either did not then enter their minds, or it was distinctly repudiated as a thing that did not need any provision. As Gov. Brown said in his message:

> The credit of the State had hitherto escaped any reflection either at home or abroad, and this may assure the world that repudiation will never find lodgment within our limits (Respondents' Compilation, p. 110).

A prediction that, I am sorry to say, has not been entirely verified.

The use of the words "pay to the liquidation of the interest" are perfectly natural in the view that complainants' counsel take of this case, but still, when it comes to be considered in view of the facts, and of the means by which this proceeding is to be carried out, it is just as evident that it was meant to be a payment into the treasury, as any one thing can be. The provision in regard to depositing balances in the treasury it is unnecessary further to enlarge upon, unless I call the attention of the court to this fact: that there never was an intention that there should be a balance. As soon as the interest is provided for, the very next line in the section declares that the road shall be immediately redelivered to the company, so that if there ever was to be any balance, it would only be an accidental balance, and that balance would be due to the company, and, of course, was not to be paid

to the State. The settlement from time to time with the Comptroller and balances to be paid over, are balances over and above the expenses, to be deposited in the treasury, and on the order of the Governor to be applied to the interest, or in contemplation of the law applied to the State, and due only to her.

Observe that the phraseology here, where it is demonstrated that it is meant to be a payment to the treasury, is the same as that relied on in the third section "for the payment by said company of said bonds with the interest thereon." It is demonstrably certain that those words in the fifth section mean *payment to the State*. Ergo, they mean in the third section payment to the State.

SIXTH AND SEVENTH SECTIONS.

The process of mental incubation is apparent again in the order and frame of the sixth and seventh sections of this act. In the sixth the provision is made for the enforcement of payment if the debt is not paid when the bond falls due. But the inadequacy of such a provision is so apparent to the mind of the draftsman when he cons his work over, that he follows it by the provision for a gradual anticipation of payment, which is to be made to the State. This is called a sinking fund of the State but, it is really the payment by the company to the State, as the act expresses it, "as between the State and the company" at a rate which, computed according to the principle of a sinking fund, will satisfy the debt, or a large part of it, before the bond falls due.

Now the complainants' counsel have taken great pains to show that, according to the provisions of the original act there might be some of that debt still remaining when the bonds were fully due. In

my mind, it is not necessary at all that the fund provided should be sufficient at that time to pay the debt. If it is sufficient to pay any portion of it, or if it may pay all of it, so that in contemplation of the Legislature of 1851–2 it was possible that this whole debt might be paid into the treasury before the bonds fell due, it answers our purposes just as well as if it was necessary, in the nature of things, that it should all be paid. It was certainly admissible that it should all be paid. It was certainly possible that it should be paid; and the possibility that it should be so paid as provided in that section, is all that is necessary for the mind of the court to seize upon to see what was the intention of the Legislature and what was the character of the payment contemplated when they speak of the *payment of the bond.*

A sinking fund is generally an accumulation, by a debtor, in his own hands, of moneys which he keeps at interest, and which is so adjusted as to provide a sufficient fund to meet the debt when due. It was certainly in the contemplation of the Legislature of 1851–2 that this miscalled sinking fund should be equivalent to a payment of the whole bond by the time the bond fell due. It was the fund of the *State*, not of the companies, accummulated from the payments of the companies. Payments were contemplated by the act of 1852, which, calculated on the same principle, would probably pay the principal. But one difficulty which the counsel now see, was seen by the Legislature in the course of a few years after this original system was adopted; and the Legislature provided for it by a fair application of the twelfth section, if it was not in itself a fair construction of the original act. As to the companies, this was no sinking fund, because between the only creditor,

the State, and the only debtor, the company, it was a payment. It was to be a credit.

It was the fund of the State; because it was the accumulation of the State's own indebtedness only, in her own hands, and utterly unavailing to pay to any other person anything. But, taken in connection with the fact that this was a scheme embracing the whole system of railroads, and a very large proportion of the bonded indebtedness of the State — an immense proportion of it — if the court will look at it they will see that if it had worked out according to the calculation of the Legislature, it would have absorbed all of the bonds by the time they became due, or would have made a provision for them; for if the companies could not get the bonds in at any time, the money would have to be paid as a matter of course, and that would make provision for them.

As a scheme then, embracing the whole issue, it was, in the grandest sense, but not in the ordinary sense, a sinking fund, which, in its contemplated workings, would have absorbed the whole issue of bonds.

In regard to the seventh section, there are two theories: one is that the section intends to provide a fund for each of the companies in the hands of a trustee, the State, for whose good faith the companies remain bound, though they have once paid their debt to that creditor. The theory is that if the creditor, the State, fails to pay its own debt its debtor may be compelled to pay that also.

That makes necessary the statement with which, in order to have a clear view of the respective relations of these parties this argument opens, for it seems that whenever that is properly present in the mind, it gives us at once a cue to the whole affair.

The complainants insist, that the section intends to provide a fund for each of the companies in the hands of a trustee, — the State, — for whose good faith the companies remain bound, though they have once paid their debt and their only debt to their creditor, and yet they may, if he fails to pay his own debt, be compelled to pay that also. The other theory is that the State took this payment, as such, of her debts; and that when she once received payment of her debt that was an end of it as between her and the company. That is what the expression means. Between her and the company the matter is ended whenever that debt is paid. But the bonds which that company paid in, if originally issued to another company, were not as to the company receiving them settled for with the State, and they were kept on foot lest possibly their cancellation might prejudice somehow the State's right. As between the bondholder and the State, the bond paid in would be satisfied. As between the State and the company to whom it issued, it would still, though paid, constitute a lien.

A hypothetical case will demonstrate the futility of the argument of complainants' counsel. Suppose the M. & C. road pays in, one bond issued the L. & N. R. R. and one issued to itself. One would be cancelled and the other not. Suppose the L. & N. to do the same thing. The result would be the same. Then two bonds would be cancelled, two not. Now suppose they exchange bonds, and each pays in her own. The State gets exactly what she got before, but all are cancelled. Suppose the exchange to be the other way. The State gets the same bonds, but none of them are cancelled. By the argument of the complainants in these three unsubstantial variations of the same transaction, three different results as to the supposed lien of

the bondholder occur. In one he has no security left. In the next he has two bonds left for his security. In the third he has all four. The State soon saw the futility of the provision and had all cancelled.

The Legislature of the State of Tennessee (if the nature of the savings which run through the whole line of these statutes is observed) has been exceedingly particular always to provide against any possible prejudice to her lien, or anything which anybody might conceive could by possibility reach or affect that lien. It has always been the idea of the Legislature to put in a saving that would cover it. The counsel on the other side insist that as between the State and the company, that clause is intended to save the rights of the bondholders. What mysterious awe and unutterable sanctity attached in the mind of the Legislature to the bondholder, that it could not name him, it is hard to conceive. When the State, by its Legislature, wants to save the rights of a stockholder, she has no such overweening respect as prevents her mentioning her view. If she wanted to save the right of the bondholder, why did she not say so in this place? This was the place to say it. The Legislature does not say there, and they do not say anywhere, that it shall remain a lien for the benefit of the bondholder.

PHRASEOLOGY OF THE ACT.

The company, by that section, are to purchase bonds and *any* bonds of the State without limitation. The counsel do not limit it. They are to pay them into the treasury. Their whole case depends upon the use of the word "payment;" "for the payment of the bonds." These bonds are to be *paid* into the treasury. Why could we not say, if "payment" means a payment, why is not this a payment and a

satisfaction and an extinguishment? These are not to be deposited, but they are to be paid, after assigning them to the Governor of the State. Our contention in regard to that matter is that this is the payment of the bonds contemplated in the third section. It is "payment" as that word is used in this act. It is the only payment provided for in the act. It is provided for by the use of the same word; and I think we may infer that this is the "payment" that was meant. For this payment the Governor is to give a receipt; and a debt paid and receipted for would, in almost every other case, be considered effectually scotched. But the counsel are not satisfied even with that. That is not all. As between the State, the creditor, and the company, the debtor, the debt is paid.

It is expressed in the act by the words "the *bond* so paid shall be a credit on the *bonds* issued to the company." Observe the phraseology. The complainants' whole case depends upon the word "bond," and the use of it in this act. "The bond shall *constitute* a lien." Observe the phraseology. The *bond* is to be a *credit*. Then the *payment* by means of a bond is called a *bond*. A *payment* by means of a *bond* is to be a *credit*. But observe again, it is to be a payment of another bond issued to the company. Complainants say that "bond," means literally bond and nothing else. We say that it very often means something else: as we say to pay a note, means to pay a sum of money which we engage in the note to pay. It is to be a payment of another bond issued to the company—that bond outstanding in the hands of C. Amory Stevens, and of these other gentlemen who speculate in bonds and who buy bonds because they have got good railroad security to them. Literally that is absurd, but you have to give it a sensible con-

struction. It is not only intelligible when you read it divested of this hide-bound construction which the counsel for complainants insist upon, but it is good English and makes good sense. This payment of a bond is called a bond. The debt to the State for the bond is called a bond. According to their construction, the lien for the payment of the debt is called a bond, if that is what "constitutes a lien" means; and the companies are to pay interest on the amount of the "bonds unpaid," "for the debt due by them to the State of Tennessee and amount due by them to the State," as used in another act—that of 1859–60, c. 93, sections 1 and 7, which will be found here in our compilation, p. 281. Yet this same act in section 8 provides for the payment of interest on "bonds unpaid," and not for amount issued, and in section 9 for a statement of "amount due."

On the argument below one of my associates called my attention to the fact that in the second section they say that you shall not use the bonds except to iron the road. How are you going to iron the road with a bond? I would like the gentlemen, in their literal, strict, hide-bound construction, to answer me that. How will you iron a railroad with bonds? Would you not sell the bonds and get the money, and do you not use the money for the purpose of getting iron, and do you not iron the road then with the iron? But, according to the literal construction of these gentlemen, you are to take the bonds themselves and iron the road with them. We have heard of paper car-wheels, but not of paper rails; nor have we ever heard of bonds being used for car-wheels. This suggestion was in fact a mistake, but the argument is sound, and the supposed use of the word as good for my argument as the actual use of it.

It may be that these words "between the State and the companies" are not clear of all difficulty. They may have some relation to the peculiar phraseology by which the word "bonds" is used in so many senses, and properly used. I am not attacking either the intelligence or the accuracy of the Legislature, for that very thing occurs in a very important act of Congress. Comp. 496–7. The act of 1862 for the building of the Pacific Railroad speaks of the payment of the *bonds* by the company, when this Supreme Court of the United States say that it fairly means payment to the United States, not to the bondholder, so that we have at least *ex post facto*, high legislative authority for the use of the word in the sense in which it is used in this act. The word in this act is used (as I expressed it once before, and the counsel for complainant seized upon it as a sort of favorite word) as a "metonym" in the seventh section, for the debt created by the bond, or by the issue of the bond. Read the section where the lien is created in connection with that; it reconciles everything in this act from the beginning to the end, and avoids any difficulty whatever. What then does this phraseology as between the State and the company mean? It is simply intended with excess of caution to guard against every possible construction which could make it affect the outstanding bond in the hands of the holder or the paid-in bond in the hands of the State, or affect the debt of the State. As between the company and the State it is to be a payment; but as to the State it is a provision for the payment by the State of the bonds, for the absorption of the bonds. What is certain about it (and that is all that is necessry for our purpose) is that it provides for the only debt that

the company is a party to, and says that that shall be paid and credited by the only party that the company owes.

Again, it says that if one of the identical bonds is paid in, it shall be a credit *as aforesaid*, and cancelled. The only words qualifying "credit" to be found in the foregoing portion of the act, is "as between the State and the company;" and when this act says it shall be a "credit as aforesaid," just supply "as between the State and the company" and you have another demonstration that the idea of these complainants is utterly untenable. Here is one of the identical bonds issued to a particular company brought in by that company and cancelled. According to their own theory, *it* constitutes a *lien*, and *it* is gone and *the lien* is gone. It is cancelled, but yet it is to be a credit *as aforesaid as between the State and the company!* Why so?

Their theory is that the bond is the lien, and that this thing is intended to preserve the bondholder's lien. But here are a parcel of non-lien bonds that are to be paid in, and it has been asked why it is, upon our theory, that if they are to be paid in, we do not cancel them? I say that, upon our theory, we are satisfied with a credlt between the creditor and the debtor, and that is enough for us. But if this thing is to preserve *complainant's lien*, upon the non-lien bonds, what does it mean? If the object is to preserve a lien on bonds, and here are bonds that are not lien bonds at all, and they are treated in the same way as the others, where is that theory? They account for the lien bonds not being cancelled by saying the lien inheres in the bond. But the State does not cancel the non-lien bonds. Why not cancel them?

On the trial below, counsel for complainants

attempted to account for this because, by the terms of the statute, that class of bonds are not to be paid into the sinking fund. You are only to pay into the sinking fund a bond which can be held and used, and it was asked how the State of Tennessee could use a non-lien bond to pay its own liability?

The reply is obvious: How could the State use any bond that is paid in there, to pay its own liability? If one lien bond will not pay itself, will another lien bond pay it?

It was then insisted that if the Memphis and Charleston Railroad Company pays in a bond secured by a lien on the Louisville and Nashville Railroad, that bond is to be held and used for the payment of the bonds outstanding, issued to the Memphis and Charleston Railroad Company. The bond is to be collected from the Louisville and Nashville Railroad Company, which is the real debtor, and paid to the creditor of the State to whom the bond was issued in behalf of the Memphis and Charleston Railroad Company.

There is no authority whatever for the construction that "bonds of the State" mean any *particular* bonds. This company—any of these companies—had a right to a fair construction of "*bonds of the State*," "which the company shall use in the purchase of *the bonds of the State* of Tennessee."

The counsel, for the purpose of their argument, not only misconstrue the language of this act, but must needs insert here, for the purpose of taking away from these companies the privilege that they had by the act—to insert here, "bonds issued to any of these railroads," a character of construction that is not allowable upon any canon of construction. They just have to interpolate the words.

These companies have the right to a fair construction of the act in that respect. They may purchase *any* bonds. They may put in non-lien bonds there; and when they do so and preserve them uncanceled with your lien bonds, complainants' whole argument is overturned. They have got to establish the insertion of those limiting words, (materially limiting the right of the companies), that the Legislature did not put there, before they can take anything in that direction.

The section provides for bonds which the company shall pay into the treasury, and the *bonds* shall be a credit on the *bonds* issued to the company. There is a great controversy again — "and the bonds shall be a credit on the bonds issued to the company." What does that mean? One bond shall be a credit to another bond, that other bond not paid in, but in the hands of Eugene Kelly or somebody outside. How is it to be a credit on the bonds issued to the company? Read it according to the sensible construction of the English language—to be a credit on the *debt* of the State for bonds issued by the State to the company, and it is just plain, simple, common, every-day English. It is every-day English as it is, but, that is the plain, simple, every-day signification of it. Here the word "bonds" is used for the amount of the bonds—the amount of the bonds in the first place which shall be a credit on bonds (*i. e.*, the *debt for* bonds) issued to the company. Of course it is impossible and absurd that a bond paid into the treasury should be a credit on Eugene Kelly's bond that he holds in New York, and which is not paid, and is not ready to be paid, and is not entitled to be paid. The "bonds" must mean the debt which the bond represents—the debt to the State.

This was no isolated transaction; it affected many roads. If one road brought in a bond issued to another road, the debt for which was secured by the like lien, of course it did not satisfy the debt of the State against the road to which it issued. The bond of the Louisville and Nashville road, *paid in by the Nashville and Chattanooga road, paid* $1,000 of the debt of the Nashville and Chattanooga Company. The $1,000 of debt to which that particular bond had given rise from the Louisville and Nashville still subsisted, and the lien to secure its payment by that company to the State still existed, though the *bond* which had caused—constituted—a lien, was *paid* and satisfied as to the bondholder. It was not necessary to provide that the Nashville and Chattanooga bond in the hands of the bondholder should not be considered as paid by the State to the bondholder. That was outstanding, and of course could not be considered as paid. That was too obviously not the result, to need any saving. It was thus not the purpose to save the lien to the bondholder; if there had been such a purpose it would have been readily expressed in other words, *saving the lien of the* holder of the original bond—but to save the lien to the State on the bond paid by the State, but not paid *by or as to* the company to whom it issued.

BONDS PAID IN NOT AVAILABLE TO BONDHOLDERS.

These bonds when paid in are to be held by the State and used by the State as a sinking fund for the payment of the bonds issued to the company, and the act, therefore, seems to imply a pledge by the State so to use them. But the very nature of the fund provided as has been stated, shows that it was unavailable for that purpose except in the mode already indicated of absorbing by its general operation all the bonds of all the roads.

A canceled bond of the State, or one indorsed to the Governor for the State, could not be made available by the State to create a fund for the payment of an unpaid bond—particularly an overdue bond, as those paid in might well be when these bonds fell due.

If the fund had been of a different character — a money fund — the specific execution of the contract could not be enforced against the State for want of jurisdiction, and because such contracts are not intended to be enforced upon the State, but only to be executed at their option, according to legislative recognition of the pledge of the public faith.

In regard to this section, the great leading idea, when it is considered in view of its plain, simple business sense, is that the complainants insist, after this payment of the debt which the company owes to the State, — its creditor, — which may occur under the provision of the act of 1851–2, that it may still (not by virtue of any contract that it has made with the bondholder, for there is no such contract, Otis v. Cullom, 92 U. S., 447,) owe it to the bondholder; and they are driven to the alternative that, after the payment, it must still be paid over again, if the State fails to pay it to the bondholder.

In construing the statute, it would be impossible, in the nature of things, to express the matter so clearly as to drive a court to an alternative such as that would be, — where the only debt contracted by a party has once been paid — upon the construction of a mortgage securing a lien for the payment of that debt, so as to require the debtor to pay another debt, not his, but the debt of his creditor. That is the very thing that these complainants insist these companies are bound to do.

Taking this statute as a mortgage, in its connection with the fifth section, the act of placing the money in the Bank of Tennessee is the act which the statute requires to prevent a forfeiture. It is, therefore, a complete execution of the duty of the railroad as to the payment of interest.

The only remedy provided in the act for the failure to make that deposit, is the appointment of a receiver. A case for a receiver is not made out, if a deposit is made; but by failure or refusal to make this deposit. It is only that failure that gives the State the right to a receiver. A case for a receiver is not made out if that deposit is made. Suppose that that payment is made to the Bank of Tennessee, and then that the money is lost. Can the State then, according to the terms of this obligation, appoint a receiver of the company? The company says:

> I have performed that which was named in the bond; I have made the deposit that I promised to make. It was upon a failure to make that deposit that your right to appoint a receiver accrued. That failure has not occurred. Your compulsory proceedings cannot be put in operation against me, because I have done all that I agreed to do.

Again let us suppose the State under the seventh section to have collected the sinking fund regularly, so that at the maturity of the bond every dollar of the bonds of the road has been paid to the sinking fund: has not the company performed its whole contract with the State? Every stipulation which the company has undertaken is performed—on the construction we give this contract. But, on the other construction the company is still bound also to pay the bondholder, upon the force of the words "bond constitute a lien."

Suppose we put this act into the form of a mortgage, with the formula, in trust, "To secure the payment of the bonds and interest"—but to be void on condition that the said company shall, on the 15th of June and December of each and every year, deposit in the Bank of Tennessee, at Nashville, the interest on said bonds, and shall annually pay into the treasury in bonds of the State, one per cent. on the amount of bonds so issued, to be used by the State for the redemption of said bonds. And shall do and perform such other acts as the State shall prescribe for her own security under the 12th section, saving the rights of stockholders, "to be void on condition that this obligation is performed, otherwise to remain in full force and effect." Could there be any seizure upon a mortgage of that sort after deposit and payment?

THE TWELFTH SECTION.

The succeeding sections up to the 12th contain nothing on the bonds or their security. But the 12th section might be regarded as the key to the whole act, and if there were nothing else in the act to protect the railroads from this suit, this section would shield them completely with its panoply.

It reserves to the State the right to enact "all such laws as may be *deemed* necessary to protect the interest of the State and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the companies." Who is to be the judge of what is necessary to protect the interest of the State? The Legislature. Such laws as they *deem*—judge—to be necessary.

And then as if to show expressly that it did not regard the future bondholders as being at all in the

way, it reserves the vested rights of *the stockholders*, but takes no notice of bondholders.

Now if there was anybody who would have any right to interfere with the acceleration of this payment, if there was anybody who would have the right to interfere with the execution of this lien or the enforcement of it, it would be the stockholders, because they are the parties who are interested in the property of the railroad company. And yet their rights are reserved. But these supposed rights of the bondholder are not reserved at all.

One point in these acts of 1851–2 I regard as very valuable in two respects—as answering a point made in the brief of counsel upon the other side, and as throwing additional light upon the meaning of the words "payment of the bonds," in the act of February 11, 1852. Some comment is made in the brief and argument of complainants' counsel upon the difference between the act of January 15 and the act of February 11, 1851–2, in leaving out of the latter the proviso reserving the power of requiring more certain and *speedy* payment by the company of said bonds and interest. The deduction which the gentlemen upon the other side draw from this fact is, to my mind, not the true one. They say the omitted clause was calculated to depreciate the bonds by reserving an option to the State, at any time, to call them in; and that, for that reason, it was left out of the latter act. We say, not so. The acts are not only *in pari materia*, but they were passed at the same session, and were in process of passage at the same time. Not only so, but the supposed intention to cure is negatived by the fact that the cure plainly did not fit the disease. Will the gentlemen tell me under which of the acts their bonds were issued? Here are

two acts of 1851–2, giving aid, to a very large extent, to railroads, some for bridges and some for the roads; and if this thing was calculated to depress the value of the particular issue of bonds under it, it was, as the court will see at once, calculated to drag down with it the much larger issue of undistinguishable bonds under the other act.

Now, if the Legislature saw this thing in this light, they would have taken a very different step and have declared that no such intent of accelerating the payment by her of the bonds at her option existed, as to either the issues under the act of January 15, or under the act of February 11, 1852. It is so obvious, so simple and so plain to have given that remedy for that disease, that it becomes perfectly clear that no such idea entered into the mind of the Legislature. They passed both the acts and left this standing in one and omitted it in the other, although the effect of it would be to depreciate the other bonds, if it ever had that construction. It never had that construction, and that was not the idea that entered into their minds at all, and the two acts were left to stand together, each to throw what light it might upon the other. In that view there is no incompatibility between the two sections. They are *in pari materia*. The bonds were to be issued simultaneously and indiscriminately under each. No mark was to distinguish them, and they were not intended to differ in anything. They were to be issued to the same identical companies, and, in everything but number, they were to be identical. They must, therefore, under the principles of construction, be read as one act.

Section 5, then, with this additional light, falls into line under the banner of right construction,

and we see again an indication of what is the nature of the payment of the bonds which is to be made in the 3d section and accelerated if the Legislature chooses, in the fourth, and provided for and altered in the twelfth. It is payment to the State in bonds accepted to sink and extinguish her own debt, not premature payment by the State to the holder.

EFFECT OF SECTION TWELVE ON IMPLIED LIEN.

If this was a contract simply between A. and B., as private individuals, in regard to which C. would, by the nature of the contract, have a right in equity to sue, or have a specific lien, it is certain that the reservation in such contract to make any such changes as the creditor and debtor might deem proper, would enable them to defeat C.'s right. After they had adjusted their rights in their own way under such a provision, in good faith, so as to extinguish the liability by an actual payment from A. to B., no court of equity, as between private parties, would grant relief, either as upon a specific lien or as upon an implied lien.

Here the State, the lawmaker, reserves the right to make such *laws* not as may be necessary—but as may be *deemed* by the legislature necessary, thus making the legislative department the sole judge of the necessity.

Let us state this case fairly as between private individuals.

One of my brothers here applies to another to borrow money. He has not the money, but he says he will lend him his note, which he can negotiate and he will take his mortgage for security.

Suppose that security is expressly given for the payment of the note—which is not this case as we read it. But further suppose the mortgage in that

case provided that the lender of the note should have power to take any steps he might deem necessary to secure himself, and he takes the step of collecting the money due him for that purpose before it is due to the noteholder, believing it to be necessary, the party being in failing circumstances, as was the fact in regard to these railroads.

Can there be any doubt that, in the absence of fraud, such an adjustment would be valid?

But suppose further, that the holder of the note stands by, knowing all this: Can there be any doubt that the payment would conclude him by estoppel?

That is the case as the complainants state it; but they say that this is a very narrow power reserved by the State of Tennessee in that respect; and upon a very narrow construction of it, they seek to restrict the power of the State to exercise it.

Complainants' counsel seek to apply here the South Carolina case already alluded to. But that case is wholly different from this, in the fact that the State there endorsed the bonds of the company, and the security there for the payment of the bond was a security to pay the debt the company owed—i. e., the debt of the company to the bondholder.

Here, too, the security is for the payment of the debt which the company owes. But that debt here is to the State and not the bondholder. The State owes the bondholder. The company owes the State.

The words of the twelfth section seem to have been copied from the act of 1852 into the South Carolina act, but the reasoning of the court there is upon its application to a state of facts so different

that it must needs have a different result. They say that it could not be intended in that act to allow the State to destroy the primary security—the security to the bondholder. And seeking to fortify this they lay some stress on the reservation of the rights of stockholders. There the right of the bondholder was not questionable. The only obligation of the company was to pay to him, and by means of a payment to him to indemnify the State. Acceleration of that payment was an interference with the contract between the company and the holder of the company's bond, which it cannot be conceived was in the view of the Legislature, and the court rightly held that the twelfth section might be construed to avoid that result. The surety to protect himself has no right to compel the creditor to accept his money invested on time until it is due.

But here the State is not interfering with the invested money of the bondholder. It does not anticipate or intend to anticipate by the twelfth section the payment to the bondholder of its own bond, which it has undertaken to pay him his interest upon for thirty or forty years. What it reserves the right to do here is, to make the company pay its debt to it—the State—in greater installments, if it deem it necessary, to its own security. Now, if, as the complainants claim, that was to interfere with a lien the bondholder had, to secure him payment by the company; if that was in legislative contemplation, there was certainly an imperative call for a reservation to protect that right of the bondholder. We say that was not meant, and therefore no such reservation occurs. That what was meant was a dealing between the State and the company, and with the obligation of the one to the other, and that the protection

provided was to the stockholder, the only party liable to injury in such a transaction. If the prospective bondholder was to have a lien, he would have been entitled to like protection, as he would have been in like manner subject to injury. If the Legislature did not protect him, it results, that it was because in the legislative view he had no such interest and needed no such protection. In other words, the Legislature did not intend that he should have the lien, and as there was no lien, there was nothing to protect.

I desire to call attention for a moment to the fact that in February, 1854, there is a legislative construction of that 12th section, and that the amplitude which we give it was before the issue of any of these bonds, or of any that are in suit, asserted by the State in the most unmistakable terms. It is in an act as to bridge bonds, and it provides that the bonds shall be subject to the provisions of any law that had been or should thereafter be passed for the enforcement of mortgages in like cases. These bridge bonds were to issue under the provisions of the act of 1851–2, and they were to be subject to the provisions of any law that had been or should be passed for the enforcement of mortgages in like cases. That shows very clearly the construction which the Legislature gave to the legislation of the previous session.

THIRTEENTH SECTION.

I will pass to the thirteenth section of this act. It seems to me that it is a very transparent medium through which to view the words of the foregoing sections.

That section provides for a proceeding if any bonds shall be fraudulently obtained by any company. It provides the manner in which that shall

be settled up. This proceeding is to be instituted on the discovery of the fraud when "reliable information" is given to the Governor to that effect "forthwith." The court is to decree a sale, the proceeds are to be paid into the treasury, and the stockholders are to be made individually liable for the "*payment of the bonds*" (there it is again, "the payment of the bonds"), and for all *other* losses that may fall upon the State, "excepting such stockholders as may show to *said court* that they were ignorant of or opposed to the perpetration of such frauds by the company.

In that case something is in contemplation, to be done long before the bonds fall due. In all human probability such a thing would occur at an early period, after the issue of the bonds.

How are these stockholders to be make liable to pay the bonds to the bondholders? They are to show to the court, *in that suit*, which is instituted at *the time* this discovery is made (which may be twenty, thirty or thirty-five years before the bonds fall due), that they are innocent in order to thereby escape the payment which is meant in that act. What is the payment that is there meant? It is a payment to be decreed against them in that court in that proceeding. That is perfectly clear. And that is just such a payment of the bonds as is meant wherever the act speaks of the payment of the bonds.

EIGHTEENTH SECTION.

Let us look at the 18th section of the act. There is something a little singular in regard to that. There are, I believe, fifteen roads altogether that are provided for in this act, and then the section goes on to say:

That when the Nashville and Chattanooga Railroad Company shall have completed twenty-five miles of their road, in addition

to the eighty miles specified in the second section of the act passed 4th February, 1848, then the Governor of the State shall indorse and guarantee in the name and on behalf of the State of Tennessee, etc.

These are indorsed bonds, different from any of the other roads. The depositions in this case; that of Mr. V. K. Stevenson, who was at that time the President and Financial Agent of that road, states distinctly that these indorsed bonds were very difficult to get upon the market; that the buyers of bonds would rather have a good principal and a bad indorser, than a good indorser and a bad principal.

In regard to the bonds indorsed, he states that he always found embarrassment in getting them upon the market, however good the road might be. Although he was one of the special advocates of that change which took place in 1852, it appears from this 18th section of the act that he was unable to carry the scheme in regard to his own road. How did that happen? By the same act provision had been made for the issue of a considerable amount of bonds (I believe $350,000) to a road which afterwards became the East Tennessee and Georgia Railroad, and to the Nashville and Chattanooga Railroad a larger amount of bonds. Of these latter bonds, $500,000 had been actually issued, and there *was* a bondholder's lien, for there *was* a lien secured by that act for the payment of these bonds to the person to whom they were due by the company, and therefore it *was* a lien accompanying the bonds. Looking to the substance—to where the debt was—and making the lien follow the debt, it followed it in that case. He had placed, I think, $500,000 of these bonds before this act of 1852 came to be passed; so that here was a direct bondholder's lien upon that road. Although

he wanted (perhaps more than anybody else connected in the railroads of the State of Tennessee) to have an issue of State bonds upon his road, he could not get it, because there was a bondholder's lien upon that road. But the East Tennessee road, which stood in exactly the same position, except that it had not placed any of its bonds, could return them and have the indorsement struck off, and obtain the direct relief of this act; and that, I think, is a very significant fact in regard to the construction of this act.

I have purposed here a minute enumeration of the manner in which the extreme solicitude about the security of the State is shown in every portion of this act, by stating the frequent repetitions of it in the various portions of the act itself; but it can hardly be necessary for me to occupy time in going over that. I shall not occupy the time of the Court, therefore, in going over that. It occupies a large space. It shows a constantly recurring solicitude in regard to the lien and the security of the State. I must say something in regard to the amendatory acts, in which the same solicitude repeatedly and continually appears, and the same entire want of solicitude in regard to the bondholders.

I will ask attention for a moment to the act of 1860. In that act, after providing that the amount paid into the sinking fund shall be an absolute payment, it enacts (section 8), that the companies shall pay interest "on the amount of *bonds unpaid* at the time the interest falls due."

As I have said, it is upon that idea, that it is a direct payment of *the bonds* that is meant in these statutes, and the words "bonds shall constitute a lien," that the whole of this case turns in behalf of

the complainants. Here is exactly a parallel case. The statute provides expressly for the payment by the company in any bonds of like character and a credit absolute, to all intents and purposes; and then it says that the company shall pay interest on the bonds unpaid. What does that mean? It does seem that I am taking a great deal too much time in regard to that matter; but if that be the turning point in a case, involving millions of money, and these gentlemen are determined to press it, it seems that we ought to use every possible means to demonstrate its unsoundness.

Complainants say that the word "bonds" means actual bonds issued to the company. We say, no. There the word "bonds" means the debt due the State from the company for the bonds. Suppose that the Memphis and Charleston Railroad Company has received one hundred bonds, and that it has paid in, ten of its own bonds: according to complainants' construction of the law there would be ninety bonds unpaid. The Nashville and Chattanooga Railroad has received one hundred bonds, and it has paid in ten of the Memphis and Charleston Railroad Company's bonds and none of its own: that would leave only eighty bonds of the Memphis and Charleston Railroad Company outstanding Now read that according to complainants' construction of the words "bonds unpaid" "the payment of bonds," and what is it? Here are one hundred bonds of one company unpaid, and eighty bonds of the other, for they have both paid in bonds of the same company.

According to complainants' construction, would not that company which had paid the State ten bonds of another company, pay interest on its one hundred outstanding bonds? And the other com-

pany, which had paid ten bonds of its own, pay interest only on eighty? That would be the result of such a construction of the act of 1860.

But it is only necessary to give the common-sense construction to that, and say that when it says "bonds unpaid" it means the debt for the bonds which it owes—the debt remaining unpaid—and all absurdity is gone.

SIMILAR ACTS CONSTRUED.

In the act of Congress giving aid to the Pacific Railroad, exactly the same phraseology occurs in the same sense. The act of 1862 provides for an issue of bonds and for a repayment (they use the words "repayment" so that there is no sort of mistake there), "of the amount of said bonds, as hereinafter provided, to the United States."

There is no possible equivocation there; and in the 6th section of that act it is declared the grants hereinafter made are on condition the company *pay* the *bonds* at maturity; and compensation for the services rendered to the United States is to be retained by the United States and applied to the *payment of the bonds* and interest, until the whole amount is fully paid, and five per cent. of the net earnings *until the bonds are paid*, shall be applied annually to the payment thereof.

There repayment to the United States is expressed, so that there is no equivocation about it; but the words "payment of the bonds" occur three times in this section, in the very sense in which they are used in the act of 1851–2. A like phraseology occurs in the act of Minnesota, on which the Chamberlain case in 2 Otto was decided; and in the Missouri statutes.

The complainants lay stress upon the difference, as they say, between the act of Missouri, and the

act of Tennessee in this: That the Tennessee act provides for the payment of *the bonds*, and the Missouri act for the payment of *the sums for which the bonds shall be issued.* Tweedledum and tweedledee seems a pretty wide difference, as compared with that. If I say "I will pay my note," or that "I will pay you the amount of money named therein, and provided to be paid," I do not think there is any very material difference in the two statements, except what people sometimes call mere verbiage.

The language of the statute is "the amounts for which the bonds are issued and accepted."

There *is*, however, a very material difference between these cases. There each company is required to make provision for the *punctual payment and redemption of the bonds* so issued as aforesaid to them respectively, and for the *punctual payment of the interest which shall accrue thereon*, in such a manner as to exonerate the State from any advance of money for that purpose. That does seem to indicate a direct payment of the bonds much more clearly than anything that can be found in the act of 1851–2. It is true that the mode in which this thing is to be done, under the act of 1851–2, is such as to exonerate the State. It is there (in the Missouri and Minnesota acts) expressly provided that the State shall not have that burden placed upon it, at all, but that the companies shall provide for the punctual payment and redemption of the bonds. You can hardly say that that is a payment to the State. It takes by far a greater strain upon construction to hold that that is a payment to the State, than to hold that that phraseology in the act of 1851–2 means payment to the State. And yet how has it been held?

The gentlemen on the other side called the atten-

tion of the court to the case of Chamberlain v. The St. Paul and Sioux City Railroad Company, 2 Otto 299. The report of the case does not set out the precise terms of the mortgage, but the terms as required by the amended Constitution of Minnesota, under which the mortgage was made, are that:

> Each company receiving the bonds shall make provision for the punctual payment of principal and interest which shall accrue thereon, in such manner as to exonerate the treasury of the State from any advances of money for that purpose. Comp. 473.

The court held that this deed and mortgage was not intended to create a trust in favor of the holders of the State bonds; that the State was primarily liable to the holders of the bonds.

> Whatever right the plaintiff had to compel the application of the land to the payment of his bonds, it was not a legal right arising out of any positive law or agreement of the parties.

We regard that case as a case parallel to the one now before the court. There was an issue of bonds in that case, by the State; there was a security given by the company to the State to secure the State, and to provide that each company should make provision for the *punctual payment* of the principal and interest which should accrue, in such manner that the State should not be onerated at all. Where does that differ in substance from the case now before this court? It was a security for the *payment of the bonds.* It was a security that the State should not be liable to pay anything for the companies, yet the court does not hesitate to say that it was a security to the State alone, and not to the bondholders.

I call attention to another fact in the Chamberlain case. In that case the bonds were issued to the company. They were required by the act to be indorsed by the company—by the *president of the*

company—and so they bore upon their face, at least the fact, that they went from that company to the bondholder. They were capable of being traced, and there was no difficulty in showing whence they came. They did not go unmarked, like these wild-hog bonds, according to the idea of these complainants, to be traced up by parol testimony, or by hunting them at a long range in "a well-bound book" one thousand miles from their place of payment and their usual market.

Then there is the North Missouri Railroad case (31 Missouri, 139). That is an act which, it seems to me, is still stronger.

In the North Missouri case there is another feature. The act of Missouri was construed by the State court to give the power to the State to deal with the lien, and to release it without any consideration. The statute reserving that lien has many points of similarity with the act of Tennessee, yet it contains indications much more favorable to the bondholders. It makes the bonds special. It designates them as the "North Missouri Railroad Bonds." It requires them to be registered in the Auditor's office. It makes them payable to the order of the company, and expressly *transferable* by the *indorsement* of the *president, his act to be considered as the act of the company*, and a copy of the act is to go with the bond.

What follows from all that?

If it had been the intention in our case to make these bonds a lien, that is the very thing that would have been done in regard to it. They would have been called Tennessee Railroad Bonds, or Tennessee Bonds to a particular railroad. They would have been made payable to a particular railroad. They

would have been indorsed by the president of the railroad company. They would have had upon the back of them the guaranty of the railroad, and the fact that a lien was retained by the State for the security of the bondholder. Every one of those things is absent from our bond. Every one of them is present in the Missouri Railroad act.

It required the company to make provision for the *punctual payment* of the interest, and the punctual payment of the bonds. What does making provision for it mean? Does not that mean *pay* them? Provision for payment which did not result in payment (unless a specific mode was pointed out) would amount to no compliance. To make provision for the punctual payment, in *such manner as to exonerate the treasury from any advances*, and pledge the tolls and income for the *payment* of the interest, made no provision for anticipated payments, as in the acts of 1852; no provision for sinking fund, and no reservation of power to enact such laws as may be deemed necessary to secure the State; no receivership, and no present provision for paying the interest out of the treasury. Yet it was held a lien which the State could dispose of, and the Legislature did accordingly release the lien.

The case of Murdoch v. Woodson, Gov. (2 Dillon, 206), is cited by the counsel upon the other side. That is upon a like statute granting aid to the Pacific Railroad, and the very question made here was presented to Judge Dillon in that case. He says:

> It is next urged that the statutory lien in favor of the State was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of its bonds, and therefore the State, holding the lien merely as trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. None

of the holders of these bonds are here, and it is not needful that we should inquire what equities they might have should the State refuse to pay them, and should they apply for relief against the railroad company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The State issued its bonds, and these were negotiated and taken upon the *State's faith and credit, without any accompanying security.*

Yet there was the name of the bond and the act under which it was passed indorsed upon it, and the indorsement expressly by the act declared to be the indorsement of the company.

To indemnify itself the State provided for and received a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision that the companies shall punctually pay the interest and principal of the bonds, but if they fail to do so, the State may sell the road to others, or buy it in itself, to be thereafter disposed of as the Legislature may direct.

He reads it as a direct stipulation for the payment of the bonds by the railroad company.

It could not be maintained, we think, that if a sale were made by the State to a third person that he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the State, with the provisions of the fourth and fifth sections of the constitutional ordinance, as expounded by the Supreme Judges, and with the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it.

The judges (continued Judge Dillon), in their answer to the Governor, distinctly say that when the State becomes the purchaser of the railroad under the lien reserved, both the lien and the former company are extinguished. The State remains liable for her own bonds and owns the railroad, and the State may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money. (37 Mo., 129-134.)

These cases base their conclusion as to the proper construction of these peculiar phrases, on the proposition that no contract relation existed between

the railroad companies and the holders of the State bonds, to support the construction that the obligation imposed by the statute or contract on the company to pay the bonds was a promise or undertaking directly to the bondholder.

I now return to the case of Chamberlain v. St. Paul and Sioux City Railroad (92 U. S., 304). In this case the counsel for the plaintiff insisted that, notwithstanding the form of the transaction, the railroad company was the principal debtor on the State bonds issued to the company, and the State was only the surety and accommodation maker of the State bonds, which is just what is insisted upon here. Mr. Justice Field, in delivering the opinion of the court in response to the above proposition of plaintiff's counsel, said:

> The State was primarily liable to the bondholders, and it was only as between her and the company that the relation of principal and surety existed.

And further, that whatever might be the right of the bondholders, it was one resting in equity alone.

> It was not a legal right arising out of any positive law or agreement of the parties. It did not create any lien (specific lien) which attached to and followed the property.

These were State bonds issued to the company, and the condition of the mortgage, as required by the amended constitution of Minnesota, was as has been stated. See the mortgage. Here we have a clear denial of any contract relation, or privity of contract between the holder of State bonds and the company, and this was in a case where the statute required the president of the company to indorse the bonds, and he did actually indorse them.

In regard to a further matter in the construction of this act, the failure to provide any remedies

against the State as trustee, if the State was to be regarded as trustee, is much more significant than it would be in the case of a private individual, because, in the case of a private individual, the failure to provide remedies is a failure to do a thing which is not at all necessary to be done. But in regard to the State, the condition of things is very different. The counsel choose, sneeringly, to put this upon the idea that the State is sacred, and sovereign, and all that sort of thing; and that we are making a ludicrous bugbear of State rights. But that is a good and sufficient reason why, if there was to be a trust in the State, and a remedy against the State, it should have been given in the act, distinctly and clearly, as it is in the Florida act. If a private party is to be a trustee, remedies are provided by general law. A defect of remedy against the King of England, raised the question whether the King could be a trustee; whether everything that went to the State did not go discharged of all trust; so completely is the want of right identified in the idea of equity judges with the want of remedy. Certainly without going to that extent we may revert to that idea to show that a trust is not to be implied against the State where no trust is declared, and where no remedy is given. Mr. Justice Bradley, in 2 Wood, C. C. R., 388, points out that the remedies are to be enforced for the State and by its own officers and agents and under its own management, as evidence that the lien was not for the bondholders, but for the State alone. The State, being the chief party in interest here, all the provisions of the act may find full play in securing the State. If there was no interest in the State, it might be a sufficient ground to imply a trust even against the State. On such a state of facts, the courts might reverse their leaning in the

other direction. But, as the State has a large interest, and proposes in the act to secure that interest, and only that, how is it possible to imply an equitable interest as a part of the contract, when it is not in the contract itself?

PRACTICAL CONSTRUCTION—LEGISLATIVE.

I now come to consider briefly the construction that has been given to this act—the practical construction of it—and what has that been?

An immense amount of legislation investment, of change, of payment, and of settlement, has been made under the construction that we contend for, and under the construction which the Stock Exchange have established on the part of the bondholders.

From the time that the first act was passed there has not been a single session of the Legislature of the State of Tennessee in which some change has not been made in regard to the security that is given by that act to the State in regard to these bonds.

The original act gave eight thousand dollars per mile; but in the year 1853–4, the very next session, the security is diluted to the extent of twenty-five per cent.—two thousand dollars per mile—and the State is to issue ten thousand dollars per mile. At the same session (and even at that session of 1851–52) bridge aid is given in addition, and every one of these additions is an increase of the burden, and therefore a diminution of the security.

From that time on the legislative construction has been that the State had the power to deal with this security at its pleasure, saving only the right of stockholders and consulting only with the railroad companies, and it has accordingly done so.

It is said that the Code contains a construction of the seventh section of this act of 1852, that is unfavorable to our view of it. The Code was intended to reproduce the act in substance and effect, with another act that was passed in the intermediate time. In regard to the constitution of the lien, it follows the words of the act itself, and, therefore, can have no special significance. But the provision for the credit, under section 7, is left out. I maintain that it is not possible, in the nature of things, that two such gentlemen as Messrs. Meigs and Cooper should have supposed that a subsequent act, merely increasing the amount of payment by way of a sinking fund, would have the effect of repealing any other important provision in regard to that sinking fund. It does seem to me that any lawyer who would look at that proposition, would say that, where repeals by implication are not favored, no such implication could possibly arise in that respect. Therefore we cannot, without stultifying either ourselves or them, suppose that they thought the act of 1855 had any effect to take away the right to the credit which the act of 1852 distinctly gave. We must, therefore, attribute to them some other motive; and the motive was simply that that part of the act which says "as a credit between the State and the company," and that part of it which distinguishes as to the cancellation of bonds, was not calculated to render the meaning of the act more clear; and therefore they left it out as not being at all important, with the idea that "as between the State and the company" was useless, and that a provision for credit upon payment was superfluous. Certainly not with the idea that the right to such a credit was of no importance, and was to be taken away by implication. They could not have conceived that a credit was to be denied, and perhaps

they could not have foreknown that it would be held or deemed important that the right to a credit should be reserved. They may have thought, as they naturally would have thought, that, upon a payment, the credit would result of course. Upon the view we take of this act, it was certainly the natural thing for them to do, to leave it out altogether. On the other view, it was the denial of a sacred right of the bondholder to his lien. When a man makes a payment of his debt, as we regard this, then it is of no use to say he shall have a credit and be released for it, and he shall no more be held liable for it, and all that sort of repetition; but, having said all that it was necessary to say, "it should be paid," they stopped.

The Code was adopted at the session of 1857–8. It took effect the 1st of May, 1858.

Under that construction they passed the act of 1860, about which a great deal has already been said. It is shown in the deposition of Mr. Campbell Wallace what were the reasons which operated upon the railroad presidents who advocated the passage of this act. The act was passed almost as soon as there began to be any payment made into the sinking fund. It was found, in making the payments into the treasury for that purpose, that there was a complication in regard to the keeping of the accounts under the original act, and in regard to the payment of interest, which required to be simplified. The companies were required to pay six per cent. upon their whole original debt, and then to pay one per cent. upon their original debt into the treasury. Now, that six per cent. was to be paid as interest by depositing it in the Bank of Tennessee, although half their debt to

State might be paid;[1] and that interest so paid there, which belonged to the sinking fund, and had to be transferred to it, was a serious complication in the keeping of the accounts; but it was necessary to the computation upon the principle of the sinking fund that it should enter into it. These men of sound, practical common sense, believing that it was better to simplify the matter, proposed to the Legislature that they should increase the amount per annum from one to two per cent., and that they should allow the interest to be paid on the amount actually due from the company to the State. It more than compensated the State for what they gave up. It simplified the accounts, and rendered the railroad companies secure in their payment; and, therefore, its promoters were willing to do it. As Mr. Wallace says in his deposition, there was a large amount of objection to it among the railroad companies; but the State enacted it, and they had to submit. He states that he had the aid in that matter of John Marshall, who was a railroad president at that time, and a most distinguished lawyer, a man eminently distinguished for the purity and probity of his character, a man incapable of anything like dishonesty, or anything dishonorable.

What does this act provide, and how does it operate as a legislative construction of the act of 1851–2?

That the money, or the bonds that have been heretofore, or may be paid by cities or railroad companies in this State to the Sinking Fund Commissioners by the first of January, 1860, together with accruing interest thereon to that date, shall be passed directly to

1 Here is another indication that the payment of the interest *on the bonds* is payment to the State and not to the holder, because it is a provision in which part of payment must go to the State from the time any part of the principal was satisfied.

the credit of the party having so paid the same, and shall be a release to said party for the amount of the debt due by them to the State of Tennessee.

That was intended as a statement of the effect and operation of the act of 1851–2; it is an assertion that it was the debt due to the State of Tennessee, for the issue of the bonds, that was to be released and considered paid; and that was their view of what was meant by that act. But the same act provided also for indorsed bonds. The bonds were all to be canceled by the commissioners. I beg leave to call attention for a moment to that.

And if indorsed bonds of any railroad company, they shall be canceled as hereinafter provided for the cancelation of State bonds, and shall be delivered over to said company or corporation, taking the president's of said company or the officer's of the company's receipt for the same, which receipt shall be filed and a copy of the same placed upon a book.

That was the company's sinking fund, so to speak, for her indorsed bonds. She owed the indorsed bonds; she had to pay the indorsed bonds; she was entitled to the custody of those that were canceled. That was her process of absorbing her own indorsed bonds. Why did they pass through the treasury?

Simply because, being indorsed by the State, the State had them to pass through her sinking fund commissioner's hands for the purpose of knowing what was done, and knowing that they were properly and regularly absorbed as required by the law. It was also a perfect security against reissue by the company. But they were not kept in the treasury. They were delivered over to the companies as the sinking fund, or more properly sunken bonds, of the company.

I say that just by the same reason that operated in regard to the delivery of those bonds to the companies who had in effect paid them off, the State retained in her own hands, as her sinking fund, the bonds that were delivered to her. It shows clearly what construction was put upon the facts by the Legislature.

> The sinking fund, when paid, in all cases shall be passed directly to the credit of said company or corporation and be a release to said company or corporation, from that amount *due by them to the State.* The commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well bound book kept for that purpose.
>
> Each and every railroad company or city corporation shall provide the interest semi-annually, as now provided by law, on the amount *of bonds unpaid* at the time said interest falls due, and not on the original amount issued to or indorsed by the State for said company, *as heretofore provided.*

That is to say, after this act, they were to pay upon the balance of the debt that was due from the company to the State, and not upon the whole original debt. I called the attention of the court before to the fact that they there use the same phraseology, "the amount of *bonds unpaid* at the time said interest falls due." Then the act provides for the keeping of a regular account. Complainants' counsel say that they are not bound by what was done at that time; that their bonds were issued, and that they are not bound by it. We do not use it in that sense. We say this is a part of the legislative-practical construction of the former act, and that, as such it is entitled to great respect and great consideration at the hands of the court.

It is said it is an exercise of the power reserved under the 12th section.

Of course, in that view, it is a valid act; but it is of value in addition to that, as a construction of the act of 1851–2.

Here is another act giving legislative construction of a similar character. It is the act of November 23d, 1865.

An Act to amend an Act entitled "An act to establish a System of Internal Improvement in the State," passed 11th Feb., 1852.

Be it enacted by the General Assembly of the State of Tennessee, That the act aforesaid be so amended that the Governor of the State be authorized and instructed to issue the six per cent. coupon bonds of the State, similar in character, in every respect, to the bonds issued under the act that this is intended to amend, and maturing at the same time, to an amount sufficient to pay off all the bonds and interest past due, as well as that to fall due January 1st, 1866, or on any bonds that may fall due during the year 1867, issued or indorsed by the State, that were issued or indorsed previous to the so-called Act of Secession, passed the 6th day of May, 1861.

It provides that those bonds shall be issued and used for the funding of the unpaid interest in arrear, including the unpaid interest due from all the railroad companies in this State. Under that act the testimony of the Comptroller in this record shows that every bond and every coupon was actually funded—although the bonds issued at that time were only worth fifty cents on the dollar; and, if these complainants are right in their construction, a vast number of these bonds were worth dollar for dollar, of the whole amount that they carried upon their faces. We insist that this act not only shows legislative construction, but that the action of these bondholders under it shows, in the strongest possible manner, the construction that *they* have given to the act—coming in and actually funding every dollar of the bonds and coupons that were outstanding, and which were liens, according to the present theory, upon our roads, making them worth twice what they received.

The fifth section is in these words:

Be it enacted, That the several railroad companies receiving aid under this act, shall pay the interest on said bonds, as it matures,

in the same manner and under the same rules, regulations and restrictions, *as they are now required to pay on the bonds issued or indorsed for them under the act this is intended to amend, commencing the payment of said interest on the* 15TH DAY OF JUNE, 1866.

We have been contending that the true construction of the act of 1851–2 was that when it spoke of the payment of interest, it meant payment by a deposit in the Bank of Tennessee—the fiscal agent of the State. Here, by this legislative construction making provision for a new issue of bonds, and incidentally referring to the act of 1851–2, it says, that these bonds shall be paid in the same way—the interest is to be paid in the same way that the bonds under the original act were to be paid. That is to say, it is the payment of the interest that is to commence on the 15th of June. The interest on the bonds is due on the first day of July. The interest due from the railroad companies to the State is due on the 15th day of June. Here is a direct and positive assertion of that construction by the Legislature of 1865. More than that, section 7 provides:

Be it enacted, That each and every railroad company in this State who have or may receive aid under this act, or the act this is intended to amend, or any amendment thereto, *shall pay* to the Treasurer of the State during the year 1867, four per cent. on the amount of its indebtedness to the State, as a sinking fund on said debt, to be *paid* in the bonds of the State of a *like character* to *those issued* or *endorsed* for said company, with the coupons on the same that have not matured, *said payment* to be semi-annually, on the 1st of April and October, and a like amount every year thereafter until the whole of their indebtedness is discharged.

A good deal has been said about the meaning of "bonds of like character." There is some old Latin to the effect that what is identical is not like. That is to say, there is a difference between identity and likeness. Here is a dispute between the complainants and ourselves in regard to these bonds. They say that you are to pay in "*identical*" bonds,

but the statute says you are to pay in bonds of "*like character.*" If the statute is right, it seems to me we are on the side of the statute; but if they are right, we and the statute are both wrong. That is too evident to be controverted. What does "*like character*" mean? It does not mean the same identical bonds, for if the Legislature had meant that they should pay in the very bonds that had been issued to them, they were certainly capable of saying it. It was a plain, obvious proposition, and easy to be stated. But they said "bonds of like character," or "bonds of the same kind," in another place. Now what are bonds of the same kind? Here were two classes of bonds, the endorsed bonds of the companies, and the bonds of the State. There were several kinds of bonds of the State. There were some that bore six per cent. and some that bore five, and some that bore five and a quarter or five and a half per cent. interest. It may be that bonds bearing five or five and a quarter per cent. under this act, would not be of a similar character with six per cent. bonds. But the thing which the Legislature evidently had its mind directed to was that indorsed bonds should be returned for indorsed bonds, and State bonds for State bonds. That is what it evidently meant; and it cannot mean anything else, unless we are somewhat restricted and say that it might not mean the five per cent. bonds for the six per cent. But this would be to repeal by implication the provision in the original act for payment in any bonds, without the intent to do so being manifest. Is there any difficulty in that construction? It means "*similar*" bonds. That which is *similar* is not *identical.* What are "similar" bonds? Just read it that way, upon a fair construction and there is no difficulty about administering this sinking fund.

Here is the Nashville and Chattanooga Railroad Company, which has indorsed bonds. An indorsed bond of the Memphis and Charleston Railroad Company would not be similar to that bond. There would be several striking differences in the character of those bonds. There would be a different obligor. It might be in very different credit. It might therefore be of a very different value. But any bond indorsed by the State, and issued by the Nashville and Chattanooga Company, would be similar, within the meaning of the act, to any other bond indorsed issued by the same company; any bond issued by the Memphis and Charleston Railroad Company and indorsed by the State, would be similar to any other bond of the same company indorsed by the State. That is exactly what it meant—that each of these payments should be made in "bonds of like character." The Memphis and Charleston Railroad if it has any indorsed bonds should pay these indorsed bonds; and the Nashville and Chattanooga Railroad would pay its own indorsed bonds, and the other railroads that had received State bonds might pay in any State bonds—or perhaps upon the strictest possible construction, any State bonds issued to any railroad. But this strictest construction is in violation of the original right to pay in any bonds of the State, granted in the original act of 1852, and therefore not admissible.

There is no difference in these bonds—no difference whatever—issued to one railroad, from the bonds issued to another railroad, except in the numbers. One of the counsel confesses that if it had not been for the act subsequent to the one under which these bonds issued, it would be impossible for them at this day even to trace, anywhere, the identity of the bonds.

I have said, that in the construction of these acts by subsequent legislative action, there was no exception to the fact that there had never been a recognition of the lien of the bondholders. In the session of 1869–70, at which an important act was passed, there occurs some very remarkable reservations and provisos; and the complainants' counsel insist that one of them is an exception to this, and that the bondholder is there provided for. I call the court's attention to the phraseology and to the peculiar condition of these provisos. It is section eight of the act of 1869, c. 38; and that shows an express proviso that nothing that should be done under the act should "decrease *the lien of the State* upon any railroad of the State until the entire claim of the State is fully liquidated, or *affect the interest* of the present bondholders of the State."

See how carefully they reserve the lien of the State and the entire claim of the State until it is entirely liquidated, and then simply preserve the status of the bondholders, whatever it may be. The question had been raised. Mr. Cooper had proposed his amendment, and the State, in fairness to the bondholders, says it is not intended to affect their status. It shall not *affect the interest* of the present bondholders, whatever that may be. Now there is no recognition there of anything, except that the question had been raised.

The same thing may be said in regard to the question raised by the Railroad Commissioners to sell railroads. By that time some talk had arisen about Nashville in regard to this bondholder's lien, and they state that there is a question raised of that sort, and that is a difficulty in the way of making sales of the railroads, and that it is therefore desirable that it shall be settled.

In regard to the passage of the act of 1870, Mr. Cooper prepared an amendment, which has been spoken of on the other side; but Mr. Cooper puts in a protest in regard to the matter, and he puts it upon the ground that he is afraid it is a scheme of speculation, and will not tend to the interest of the State, and, therefore, he objects to it. He puts in this proviso (or proposes to put it in and it afterwards gets in there), in which he does not recognize the claim of the bondholder; and when he comes to make his protest, he does not put it upon that ground, but puts it upon the ground of policy. He does not, as his private opinion, even recognize the right of the bondholder in regard to the matter.

PRACTICAL CONSTRUCTION BY BUYERS AND SELLERS.

Attention has already been called to the fact that these bonds were sold in the market without any possibility of distinguishing bonds of one railroad from bonds of another railroad, and that has continued from the time of their first issue until within about two years before this suit was actually commenced, *post litem motam*—after it was in agitation —after they were proposing to bring it. Then, as has been shown, a slight difference, and a very slight one, in regard to the value of the bonds (a difference of from *one to three* per cent.), sprang up for speculative purposes; but the testimony in this record shows that, for twenty-five years after these bonds were first provided for, and twenty-four or twenty-five years after the first of them were put upon the market, there never was one single cent of difference in the price, on account of the issue of them to one railroad rather than to another, on account of this supposed lien; and, even after Mr. Terry's attention was called to it, he does not show that he paid one cent of difference between one and the other.

Further than this there is not to this day, and never has been, in the Stock Exchange, a cent of difference or a shadow of difference, up to the present time. It is only in what they call the open market, that is, among the street brokers, or the curbstone brokers, I suppose (which is a very open market), that the difference of one, or two, or five per cent. occurs. But, up to this day, in the business circles of New York they all stand upon the same footing.

I extract some of the testimony on that subject. Mr. Stevenson says, in his deposition:

Q. In negotiating bonds were any representations made by the company or their unauthorized agents to the effect that the bonds were liens upon the roads in favor of the holders of the bonds?

A. Never that I know of—never in any case.

In this record, from beginning to end, universally the testimony runs the same way. The counsel of complainants, perhaps, will bring in here a circular issued at one time after the war by an agent of the State making allusion to something of that sort; but these business men, these brokers, these men who sold the bonds at the outset, this gentleman, Dr. Ramsay, and every one who succeeded him, testify distinctly to the fact that they never, in negotiating the bonds, alluded to the fact, or supposed the fact to exist, that they were a lien in favor of the holders of the bonds.

Never that I knew of—never in any case. Straight bonds sold for more than the indorsed bonds; that fact had been tested by the sale of bonds with roads that I was connected with. The indorsed bonds by the State for railroads sold for less than straight bonds in all cases.

These indorsed bonds were plainly bonds with a lien for their payment.

And, therefore, parties selling bonds and parties buying bonds were each mutually anxious that no idea of lien should be had on

either side. There was a difference in price of one to two or three per cent. on all bonds indorsed by the State for the roads in the State, and straight bonds issued by the State without any liens upon anything.

Q. Do I understand that bonds of the State of Tennessee which had been issued to pay for the subscription of the State for stock in turnpikes, having no lien upon anything, sold for more than bonds of such railroad companies as the Nashville and Chattanooga Railroad and the East Tennessee and Georgia Railroad indorsed and guaranteed by the State?

A. I do; the difference was one to three per. cent., never less than one, that I ever recollect of, and as high sometimes as three per cent. difference.

Q. In selling State bonds loaned to railroads, in the New York market, what indorsement or system of marking, if any, was resorted to by which the bonds could be known in the stock market as having been loaned to any particular company?

A. There was no such indorsement that I ever heard of; none on any of the bonds that I had anything to do with.

Q. What was the difference in price, if anything, between the straight bonds loaned to the railroads under the Internal Improvement Act of 1851–2, and straight State bonds that had been issued to build the capitol, buy the hermitage, and for other purely State purposes?

A. Not one particle; they all sold precisely the same. No question was ever asked until after the war, as to any bond issued by the State being more valuable than another bond issued by the State.

Q. What was the difference in price, if any, between State bonds issued to important and solvent roads and to those that were issued to unimportant and insolvent roads?

A. There was not a particle of difference; and no difference in the price after the roads became insolvent even after the war. Nobody ever asked or cared whether the bonds were issued for the Nashville and Henderson Road or whether issued for the East Tennessee and Virginia; or Memphis and Charleston Road, which was then one of the best railroads in the State; nobody asked any questions and never thought who they were issued to, or how they were issued.

Q. What was the price of Tennessee State bonds when the Internal Improvement Act of February, 1852, was passed? Were they at or above or below par, and how much?

A. I don't recollect accurately; my impression, generally, is that the bonds were never below par during the building of the

roads, except, perhaps, in the panic for a very few weeks. They were always about par, or a little above. Certainly that was so about 1852, and from that to 1854, 1856, and 1858. Perhaps 1857 is the time I said there was a panic, and the bonds might have been for a little while below par, but I don't think they continued so long.

That is the very time of the writing of these messages of Governors Harris and Johnson in regard to a depreciation of ten per cent., which messages the complainants' counsel read; the very time, it will be found, when there was a general panic in the country, and when we were winding up the free banks of the State of Tennessee on account of the breaking up of a few of them under that free banking system.

Mr. Stevenson further testifies:

Q. When railroad companies would receive bonds from the State under that law, would they keep any list or memorandum of the numbers of the bonds received by them, so as to identify them and keep trace of them?

A. No; not for that purpose; but whenever any were shipped I always had the numbers taken until I knew when they were received, so as to identify them in case they were stolen or lost on the way.

PRACTICAL CONSTRUCTION BY OFFICERS OF COMPANY.

That is a statement in regard to bonds which it is supposed, on the theory of these complainants, it was the duty and the obligation of these railroads specifically to provide for; and the companies as this testimony shows, and as the testimony of several of the officers of the Memphis and Charleston Railroad shows, did not even keep upon their books a memorandum. Their books show that a certain sum in bonds was received. The Memphis and Charleston Railroad did happen to have one bookkeeper who made one entry of bonds from such a number to such a number, but it is an exception and an accident. These officers would absolutely to-day be unable to show, except by go-

ing to the Secretary of State's book, what bonds were issued to them, except in that one instance in which, by accident, one bookkeeper made a different form of entry from the usual form. So utterly indifferent were they about the identification of the bonds on which they are supposed to have had imposed upon them the duty of paying the interest, so entirely were they negligent in regard to it, that they did not even preserve the means of knowing what bonds they were that they had received.

In this case the court will see that Mr. Stevenson treated the bonds just as he would bank notes. If he had bank notes, and had to remit them by mail, he would take the numbers of them. But in another place he says it was not the habit of the company to do so.

Mr. Stevenson testifies upon that point as follows, at page 7 of the printed deposition:

Q. I mean by my last question, was any record kept with a view of being able to trace the numbers of the bonds so as to know what bonds to pay?

A. No, sir; you paid in any that you had; you paid in just as you chose.

The complainants' counsel insist that there was only one kind of bonds to be paid here, under the Act of 1851–2, and they meet me with that; but here is the practical construction given to it. Mr. Stevenson says:

You paid in any that you had; you paid in just as you chose; bonds and coupons were indiscriminately paid in; they would be paid in without regard to whether they belonged to bonds issued to them, or any other bonds, unless it was indorsed bonds.

Of course the indorsed bonds were not State bonds in the sense of the act. He further says:

We always paid identical indorsed coupons, and we paid identical indorsed bonds in redeeming them, because our immediate liability was on them, but the other bonds we never took any

charge of, because we did not consider there was any lien on them; we never undertook to pay the particular bond issued to us, but whenever it came to paying indorsed bonds, they were very careful to take up bonds that were indorsed for them, and so with the coupons, that is they paid the coupons that the State indorsed for them.

Q. When railroad companies of Tennessee would pay the interest, which they had agreed to pay, to whom did they pay it?

A. They paid it to the State.

Mr. John T. Terry also testifies upon this point as follows:

Q. When your firm and yourself became purchasers of Tennessee bonds, what security for the payment of those bonds and the interest thereon did you believe you were acquiring by such purchases?

A. I supposed the railroads *would pay the amount in to the State, and we should receive it from the State*, the State making good any deficiency.

This is the gentleman you remember, who was so particular about what bonds he got. He purchased with the supposition that he was getting bonds with a lien and supposed that it was to be paid by the *railroads to the State* and by *the State to him*. And yet he says that he thought he was getting the security of the railroads—the first mortgage.

Mr. Stevenson further testifies:

Q. When railroad companies of Tennessee would pay the interest which they had agreed to pay, to whom did they pay it?

A. They paid it to the State.

Q. Through whom?

A. To the Bank of Tennessee. It was a State bank, belonging to the State, and its business was generally done through that bank. The Bank of Tennessee was always the fiscal agent of the State of Tennessee.

Q. When a railroad company would pay in a given amount of money to the Bank of Tennessee for interest, would it designate to the bank the particular bonds or coupons upon which the money was to be paid, or did it just pay in so much money on account of interest due from the company to the State?

A. Well, the companies knew always what they had to pay, and sometimes they would go and pay it. Say the company owes this to the State for interest on the bonds issued to it; sometimes they would pay in part to the State, and the State would let it run a little, but we would pay it all in from time to time, but it was never paid on any particular bond; it was paid as so much interest due the State.

Then he goes on to state that he was cognizant of the facts under which the change in system occurred, from issuing indorsed bonds to the issue of State bonds.

I will read from another deposition simply for the purpose of illustrating further the mode of dealing with the bonds on the market. Columbus Powell, on page 4 of his deposition, testifies as follows:

I have no connection with nor interest in any railroad of the State, nor their stocks or securities.

It was a well known fact that these short insolvent railroads received twice as many bonds from the State per mile as the solvent roads, and yet the bonds on the market sold at the same price, as my books will show; and I give the following illustrations of actual sales from my books: we sold through our broker, in the Board of Brokers in New York, on September 20, 1866, $80,000 of Tennessee bonds at 71¾, 72¾ and 73, and we delivered in consummation of these sales bonds indiscriminately from the following roads, "East Tennessee and Virginia," "Knoxville and Kentucky," and "Rogersville and Jefferson." This is only an illustration of what frequently occurred, and in one instance we sold in the same manner $100,000, in which the bonds of the Misssissippi Central Railroad were delivered in common with the bonds of the railroads above mentioned and at the same price.

The reason for the name of Old and New Tennessee Sixes was on account of the old carrying with them five past due coupons, when the new sixes were placed on the call of the stock board.

There was a difference between the new bonds and the old bonds, but that difference did not all relate to whether or not they were issued to the railroads.

That custom was continued after the coupons were paid or funded by the State, when the difference in the market value of the old and new was reduced to a merely nominal difference.

I suppose it grew out of the idea that ante-war bonds would be paid more readily than the post-war bonds. He testifies further:

All six per cent. State bonds issued prior to 1860, whether to build the Capitol, buy the Hermitage, pay for the State's stock in banks or turnpikes, or to railroads under the Improvement Acts, or for any other purpose, were called old Tennessee sixes, and without regard to what they were issued for, was a good delivery in the New York market, and at the same price.

If I understand the process in the New York market a man bids for so many Tennessee bonds, and he has no more idea of what Tennessee bonds are to be delivered to him than he would have beforehand what particular United States Treasury notes would be delivered to him in payment of a debt of one thousand dollars. He knows that any sort of these bonds is a good delivery and a compliance with the contract, and he is bound to take them. Mr. Powell so states.

Mr. Powell further testifies:

Before the war the bonds issued by the railroad companies of Tennessee, with a first mortgage lien on the property of the roads and indorsed by the State, did not bring as high a price in the market as straight State sixes issued to aid the railroads or other purely State purposes. The reason for this is that the credit of the State was so high, as through her fiscal agent, the Bank of Tennessee, she promptly paid her interest every six months in New York City. No doubt or apprehension was either felt or expressed as to her ability and promptness to pay her interest; while in the vicissitudes of railroad projects there was always doubt, and no such confidence did or could exist, and notwithstanding the State indorsement, it was secondary, and it was felt that in case of default on part of the railroads, the State would delay until the lien on the railroad property in favor of the bondholders was enforced and exhausted before she would discharge her secondary liability.

Accordingly, we find in one of these documents in our compilation a recommendation by Governor Harris to provide for that case, but the Legislature never provided for it. The State provided for the prompt payment of her own bonds, but Governor Harris stated that some of the railroads had defaulted upon their indorsed bonds, or were likely to do so, and it was necessary for the State to make provision for the payment, but the State did not make any such provision for them.

A good deal has been said in this case about a message of Governor Brownlow, as showing what was the construction put upon these acts by some of the State officers who practically construed and acted under this act. They acted in accordance with the testimony that I have already shown. But, it is said that Governor Brownlow gives a different construction. The occasion that called forth that message was this: In a previous message at the same session, Governor Brownlow had stated to the Legislature that six of the leading railroads in the State were in the hands of receivers, and that two others (making the eight important roads in the State) he would also have placed in the hands of receivers but for the fact that he had found by experience that such proceeding would only onerate the State with costs and expenses.

Now, it was upon that message of Governor Brownlow that the Legislature proposed to repeal or alter the whole system of railroad receiverships, carrying out the logic of his experience, and saying that "if your experience with these eight roads shows that we are continually running in debt, we had better quit." When that proposition came to him, or when he heard of it,—for at that time he

had no veto—he sent in a message in which he argued very strongly the proposition that complainants' counsel refer to and rely upon,—that it would be an act of bad faith not to carry out the provisions of the act of 1852, in regard to receivers; and he does say there, that the bondholder *in honor* is entitled to an interest, and that the State is *in honor* bound to apply these funds arising from these railroads to the indemnity of the bondholder. In that message he says: "In point of *honor in fact*" (as distinguished from law—this is his expression), "there is an obligation to the bondholder;" but in that message, in every portion of it these expressions are simply used in a general sense. He says that the credit of the State is pledged, and that the property of the railroads is a security for the bond —a basis of credit. He says:

> The internal improvement policy of the State, established by the act of February 11, 1852, has been deemed by our wisest men of all parties, since its inauguration, as a prudent, practical, and wise system. By it, the State: (1) Invited its citizens and encouraged them to use their surplus means to develop the State. (2) She combined her means with those of the citizens, and issued her bonds to railroad companies to secure the construction of the roads. (3) She indemnified herself by retaining a prior lien on the road so as to give credit to her bonds, with the railroads as a basis, without looking to taxation of her people.

That is one of the things relied upon. What does it amount to? A bank makes a statement for the purpose of showing her credit. What does she rely upon for the purpose of maintaining her credit? She states her bills receivable, her bonds and mortgages, her cash, and she states all that she has in the way of securities and in the way of available property. In exactly the same sense, Gov. Brownlow uses the phrase here, "so as to give credit to her bonds with the railroads as the basis" of her credit, "without looking to tax-

ation of her people"—and then he protests as an act of bad faith, that the State ought not to do away with the act authorizing the appointment of receivers, by means of which the security of the State is to be enforced. That is all there is of any value in the message of the Governor.

Gov. Brownlow would seem, from this, to be a marvelously proper man to construe a statute. Let us see what practical construction he gives to it. Turn to the message of Nov. 5, 1866, in regard to the East Tennessee and Georgia Railroad.

This message is supposed to be an act of construction. It looks to me rather like the opinion of a *very distinguished jurist* upon a question of that character, to which it does not appear that he had given very particular attention; but it only speaks of the State indemnifying herself by retaining a prior lien on the roads so as to give credit to her bonds, in the general sense in which a bank gives credit to her paper, by showing her ability to pay,—by showing her bills receivable, her mortgages and other means as a basis of credit—in other words, means of payment, as a basis of credit. That is the sense in which the message is properly to be read. This is a message simply to prevent the repeal of the law authorizing the appointment of receivers.

Governor Brownlow does give some practical constructions, or advises the Legislature of certain practical constructions that are significant in regard to this matter, and we will claim the aid of *his distinguished ability as a jurist.* Suppose we turn to his message of November 5, 1866, in regard to the East Tennessee and Georgia Railroad, where he says:

"The commendable spirit with which you have come to the rescue of the railroads in the State, and the ability with which you have restored and sustained the State credit, emboldens me to ask of you still further exertions on behalf of the same great interests. I recommend, if need be, the extension of further State aid to said roads. The State has already invested in the two roads I have mentioned over $4,000,000. They are main trunk roads and will ultimately *repay* every *dollar the State may loan them* so that the path of both interest and duty is plain. I further advise that the four per cent. of a sinking fund required on all the roads of the State be reduced to two per cent, as this will be ample."

Ample for what? "To absorb the whole debt." Why does he not say "with the bondholders' consent?" Why has he been so negligent as to forget, like everybody else here, the interest of these bondholders? This was the 5th of November, 1866. On the 10th of December the recommendation is indorsed by two millions of dollars' dilution of this lien. Two years after, November 10, 1868, the same learned doctor of hermeneutics and interpretation takes under his fostering care a project of exchanging second mortgage bonds for State bonds, the substitution mortgage scheme; and that blossoms out and bears fruit in the scheme under which millions and millions of debt were absorbed by the State.

PRACTICAL CONSTRUCTION—SUBSTITUTION ACTS.

But it is said that those substitution measures were not a proper exercise of the power reserved to the State to take measures for her indemnity. We have already shown that this was a matter to be judged of by the Legislature, and the wisdom of those laws is manifest and is justified by the event. The testimony of Mr. Geddes, one of these bondholders, was to the point that he thought it was a judicious arrangement by which these debts would be absorbed, and the bondholders ultimately benefited. But it is not in this view that we are now

presenting these acts. It is as a claim of power by the State to dispose of the lien as her own. Yet the result proves the wisdom of the measure.

The foreclosure sales made by the State, of eleven defaulting railroads whose aggregate indebtedness amounted to the enormous sum of $19,593,029, realized $6,698,000, a little over 33 per cent., while every dollar of the indebtedness of those roads whose debts were settled under the substitution acts, amounting to $14,692,768, was realized. Now these are large figures in a State like Tennessee. Over $20,000,000 were absorbed by the State of Tennessee, and her people relieved from the payment of that sum, at a time when the history of our State will show there was a perfect spirit of honesty in regard to the payment of this whole debt.

The message of Gov. Brown, and the testimony of Gov. Brown taken in this case, will show that at that time no controversy had been raised on the subject of the honest payment of the State debt; and the manner in which he conducted the canvass, and in which he conducted himself as the Chief Executive officer of the State in advocating and carrying out the scheme for the payment and refunding of the State debt, will prove that, up to that time, everything had been done in the utmost good faith in regard to these schemes, and the fact that there was a reduction of over $20,000,000 by these means, is a full justification of the wisdom of those who adopted them.

What was the condition of things then? On the 25th of January, 1865, the Commissioner of Railroads for the State of Tennessee reported to the Legislature that in the year preceding July, 1864, no railroad in the State except the Louisville and

Nashville railroad had done any business. In Governor Brownlow's message on the 18th of October, 1867, he reports seven railroads in the hands of receivers. In the message of November 10, 1868, he reports six railroads in the hands of receivers, and that they are indebted to the State on interest account, due July 1, 1868, $1,120,996.86.

The interest of these roads as well as that of the State require that they should be sold and the proceeds thereof be applied to the reduction of the State debt.

I would have seized the other two roads for failure to pay the July interest, and placed them in the hands of receivers, but that I had learned by experience that to do so would only entail increased burdens upon the State treasury.

In the same message he speaks of the roads in East Tennessee, and what is necessary to enable them to pay.

In the message of Gov. Brown in 1871, he says—and he says it after a canvass in which he and his competitor had both taken a stand in favor of the payment of all the honest obligations of the State:

But the people are determined to preserve the honor of the State by meeting fairly all her obligations, and paying all her necessary expenses. This is their first desire, and, secondary and subordinate to this, is their wish to reduce the rate of taxation.

Again he says:

This question was fully discussed throughout the S ate in the canvasss which resulted in our election, and the declaration that the whole debt must be paid, met with the unqualified indorsement of the people.

And he believed so; and, at the time, everybody believed so; and I think if the people had been left to their own impulses in that respect it would still be so.

In this message he indicates that the "delay of the solvent roads that have not retired their indebtedness to the State under the act of January 20, 1870, to avail themselves of the benefits of the act,

indicate an indisposition to do so," an indisposition on the part of the roads to avail themselves of the benefit of these substitution acts and acts enabling them to pay their debts in State bonds. He recommends that the act be repealed, to take effect in future, as a means of enforcing the payment. He says:

> The reason for this suggestion is that ample time has elapsed for these roads to have aided the State in diminishing her outstanding indebtedness.

In the message of 1873 he says:

> The fruits of the legislation of the last three years are most apparent in the immense reduction of our bonded debt, and the perceptible improvement in the value of our securities in the money markets. * * *
>
> For more than three years the people have been in power, and yet no interest on the public debt has been paid, nor has any provision been made for it. A sufficient answer heretofore has been, that there was a large floating debt that could not be disposed of except by payment out of the current revenue. This floating debt, * * * amounting to near $3,000,000, has, together with current expenses, been paid or provided for.

He then urges immediate provision for interest. In the message he speaks of the lien on the solvent railroads as a means of reducing the debt.

The railroads were embarrassed by the debts; they were unable to make profits; they needed renewing of rolling stock and track, and must have capital; they were going into the hands of receivers; the receivers were expensive, and, like all public agents, not successful managers of railroads. The companies could not get new credits, and, without it, the security of the State was depreciating, and the protection of her interests, in this regard, and in many others, demanded that her enormous debt should be reduced to enable her to pay the remainder.

CONSTRUCTION BY TENNESSEE COURTS.

Cases under the Act of 1851–2, as has already been stated, have once been before the Supreme Court, and twice before the chancery court of Tennessee; and they have spoken in general terms, in the same way that the act itself speaks, of the interest of the State, and of the interest of the State alone.

I have already stated, in substance, that this litigation is perhaps the best illustration of the absurdity of the contention that this lien was to be for the payment to the bondholder directly. If that was contemplated, the parties must be supposed to have contemplated the disastrous consequences here presented to our view, double payment by the company, and the right of a scattered and undefinable body of men, without head or representative, to be consulted in every measure of financial policy, which the State undoubtedly meant in this whole scheme to reserve within its own exclusive control, and the further right to these scattered bondholders to disturb and revise, after consummated, and at any distance of time, any adjustment of the State's rights against the company. That is what they are asserting here to-day by this suit. To borrow the language of Mr. Justice Bradley, in 2 Wood, 452, "I do not believe there is a railroad company so bold as to ask a loan of money on a deed of trust which could bear such a construction, or a capitalist so foolish as to grant the loan."

There is no company so bold as to ask a loan of money on a *lien* which could bear such a construction, no State so foolish as to make that loan.

PRACTICAL CONSTRUCTION BY COMPANIES AND OFFICERS.

It has already been stated that the practical con-

struction of this act is wholly at variance with the theory of the complainants' case.

The railroad companies on receiving the bonds kept no entries or records of the numbers, letters and dates by which they could pay the specific bonds or interest upon them. They were never directed to do so, by the State officers, nor were they instructed to pay any specific bonds or coupons, but simply that they owed so much semi-annually as interest which they were to pay. The act required no entry or record to be made in the office of the Comptroller, he being the state officer concerned in all negotiations with the railroad companies in that behalf. The only record in his office being kept under an act of 1842 in a book for registry of State bonds, and not in the accounts of the railroad companies, as is distinctly shown in the proof. Nor was it ever the practice to enter the numbers of the bonds on the accounts of the railroad companies, but only to charge them with so much due for bonds. The "well-bound book" in which receipts were taken was in the State department, not in that of the treasury or of its accounting officer. The payments were to be made to the fiscal agent of the State, as has been already shown.

There is one consideration, perhaps, that I ought to allude to in regard to that. The act so much regards the acts of the bank as being the acts of the Comptroller that it does not require any notice to be given to him, although it does require the Comptroller to notify the Governor. The identity of the thing is so complete that he takes notice of whatever takes place in the bank, and no notice is required to be given to him, and no express authority is given to him to draw his warrant or to check out his funds, although the authority is expressly given

in regard to the bank at Knoxville, into which the East Tennessee and Virginia Railroad Company, (then Hiwassee) were to make payment, which did not stand in the same intimate relation with the State.

But the act of 1849-50, c. 115, s. 3, settles the position of the bank, cited by complainants' counsel in brief, p. 196. The treasurer is there directed to pay interest on all outstanding State bonds. "Provided, however, the Bank of Tennessee shall act as agent of the treasurer in paying the interest that may be due and payable at Philadelphia or New York."

No payments were ever made directly to the bondholders by the railroad companies. No distinction was ever made in keeping the accounts by which the moneys paid in by any particular company were or could be appropriated to the payment of the interest on bonds issued to that particular company. The companies took no pains to procure the particular bonds issued to them, though they could have procured them with a little trouble. and at exactly the same price that they gave for those of other companies, or other bonds issued for other purposes. They paid millions not suspecting that this lien was worth the slight trouble that this would have given.

It is utterly inconceivable that if they thought there was any difference in regard to their credit, between paying in bonds of their own company or in bonds of any other company, that they would not have exchanged bonds and had them canceled under the 7th section, rather than to have got the bonds of other companies and paid them in. But they did it indiscriminately, showing conclusively the construction that they gave to it, that they would get no benefit in the one case, over what they

got in the other. If they had believed at all that they were subject to this onerous lien—which is now insisted upon, to subject them to a double payment, is it conceivable that they would have been so careless in regard to the matter? And afterwards, when they were to pay their whole debts at once, afterwards when there were to be payments for purchases of railroads—is it conceivable that, in a matter involving millions, they would not have hunted up the particular bonds and brought them in here, when they were all of the same price in the market? Would they not have given from five to ten per cent. more to be secured in their rights in future if they regarded the matter as placing them in any danger upon a proper construction of that act? They had acted in that way for twenty years; they believed in it; and in fact they had given it the true construction.

The counsel on the other side talk about newly discovered constructions. Who has made newly discovered constructions? It is only within a few years that any difference at all had occurred in the markets.

We have had in Tennessee two Funding Acts, and in the framing of them the railroad companies took no pains to get any advantage. They would have had a very great influence if they had insisted upon it there, and would have been able, if they had put their influence to work for that purpose, to obtain, instead of the registering of old bonds, a requirement for the refunding of the whole issue. But they were utterly indifferent to it, and contented themselves with the construction that had so long obtained, believing there was no danger from it.

PRACTICAL CONSTRUCTION BY THE STATE.

The State from the time of the first issue of bonds

assumed to control the debt and lien as its own exclusive property and right. By the act of 1854 it increased the amount of bonds to be issued to each mile of roads, from $8000 to $10,000 per mile, thus watering the security 25 per cent. by increasing the debt. At the same time the State diminished further the security by dispensing with the preparation of the bridges by the companies, thus making the property on which the advance was to be made or had been made less valuable, and by making a still further advance for bridge aid, again watering the security by increasing the debt. By the acts of February 17, 1854—January 19, 1855, the State changed the length of the completed sections on which bonds should issue, and thus diminished the assurance of practical ability of the companies concerned, so affecting the value of the security. In the year 1861 the State required the payments originally required to be made to the bank, to be made directly to the treasury. After the war the State advanced to the various railroad companies large amounts of bonds, reserving the like lien, thus asserting complete ownership over the lien, diminishing the security by increasing the charge; and especially in regard to the Memphis and Charleston Railroad, it increased the advances from $1,100,000 to $1.700.000.

As I have already shown, it advanced $2,000,000 upon the roads in East Tennessee that had $4,000,000. In the case of the Memphis and Charleston road the increase was six-elevenths of the original debt, and that is charged in the bill. Again the State sold the railroads which failed to pay the interest and sinking fund into her treasury, and by her courts declared that the bondholders had no lien or right of payment from the companies. This is a judicial opinion and decision entitled to

weight in these cases as authority, and in the cases that are to be argued hereafter as *res adjudicata*.

It was not appealed from by any bondholder, though the utmost publicity was given to the proceedings. A bondholder and an agent of the bondholders, Mr. Dempsey Weaver, who is shown by the record here to have represented a very large number of bondholders and a large amount of bonds, was made a party, and the holders were made parties by publication, and are bound by the proceedings; and they did not appeal.

There is, therefore, no decision of the higher court; but the Court of Chancery, corresponding in grade to the court in which Kent sat, decided the question, and it stands unreversed and without appeal taken. I maintain that it is a judicial construction entitled to great weight in this court.

Judge Trigg decided the same question at Memphis in a case that was there argued by the same counsel whose briefs appear here for complainants, or by some of the same counsel. After a most patient hearing and most careful investigation, and after taking time to consider the case, he decided that this lien did not exist.

From the companies who could pay, the State exacted the whole amount of their debts, principal and interest, and gave them full discharges for their whole liability. The moneys paid in by the companies have always been used by the State as any other money in her treasury, and appropriated to interest or not, as the State saw proper, mixed with the other moneys of the State out of which all other payments have been made, and used for other purposes when interest payments were suspended. Yet never while there was anything due from the

companies to the State did the bondholders complain, or apply to any company for payment of their coupons, or attempt to coerce payment from them, although the coupons were greatly below par, and were not being paid. The State always received the price bid for the sold roads in *any bonds* of the State, and transferred the whole lien.

By the act of 1860 the State fully asserted the construction we claim for the act of 1851, assuming and asserting that the debt secured was the debt due to the State for bonds issued and providing for their being extinguished and discharged by payments into the treasury. By the act of 1865 the State in an act for a new issue of bonds gives a reading of the act of 1851, by reference to it and a paraphrase of its payment provisions which I have already alluded to by saying that the bonds were issued under the same provisions of the act of 1851 as to the payment of interest and principal, and that the payment should commence on the 15th day of June and not on the 1st day of July.

Now all these are before any *lis mota*, and before any apprehension of such claim had ever arisen in the State of Tennessee, and before the time when there can be any imputation whatever cast upon her good faith. While every act of every officer connected with the payment of interest on State bonds showed how they construed its provisions—the companies were each paying interest to the bondholders on their own bonds, indorsed by the State, on which precisely the relations do in fact exist that the complainants say are created as to these bonds by the acts of 1852, so that the thing was presented to their minds in both views.

These indorsed bonds created precisely the rela-

tion that they insist exists under this act; and that was the system that was, by this act abandoned. In their proof they actually insist that the proposition of Mr. Wisener in the General Assembly was a proposition not to return to a system that is exactly what they claim this to be, but they claim that that was a system exactly the reverse of what this is, and that that proposition was a proposition to do exactly what we say now the Legislature did do by this act. In other words, they reverse, entirely, the whole operation of that amendment of his, and put it entirely upon the other side.

The paying of interest by the companies on their own indorsed bonds in every case, paying it directly to the bondholders, shows clearly the distinction between this case and that: the State bonds issued to the company and not indorsed by the company, and the company bonds indorsed by the State.

PRACTICAL CONSTRUCTION BY BONDHOLDERS.

The bondholders gave the law the same practical construction. They took the bonds without reference to any supposed security for their payment by a lien on the roads to which they were issued; for, whereas they found upon the bonds no mark whereby it could be seen that they were issued to any particular company or even to any railroad, they took no step, did no act, made no mark to designate them. The successive holders from the first purchasers to the present, including complainants and all present holders, made for the twenty years or more during which the bonds have been upon the market no distinction in price between those issued to solvent and insolvent roads. They witnessed the several acts of the State assertive of the exclusive right and lien of the State setting up no

contradictory right or claim, making no remonstrance, objection or complaint. They allowed the companies to obtain new credits, subtituting bonds of their own under acts purporting to transfer the debt and lien of the State, acts passed in direct denial of their claim, and took no steps to prevent it. They funded every dollar of coupons on bonds issued to railroads into new bonds under the act of 1865. The Comptroller proves that *every dollar* of those coupons were funded under the act of 1865. They gave receipts for the new bonds, in their own names in the Comptroller's office, so that every bond and every then holder is brought directly up to the question; and he, with this supposed lien, which is perfectly good in a great many instances, goes and takes a new bond, worth fifty cents on the dollar, at thirty years after date, taking the sole credit of the State in lieu of the joint credit of the State and companies, as they now claim. It does seem to me that no practical construction could be stronger than that. If that sort of thing could happen, with that idea present in the mind, it would be a very strong argument in favor of the Darwinian theory, at least, showing that the bondholder class had not got much beyond their first step in intelligence in their progress from our progenitors.

The first act for funding was November 23, 1865, chapter 9. They funded again under the act of 1873, in the same way, and in neither of those fundings did they take any steps by which they could preserve the identity of the coupons, and by which their connection with the railroad bonds could be traced, and by which their now asserted lien could be worked out. As I said before no bondholder ever instituted any proceding against the railroads, or demanded interest of them.

PRACTICAL CONSTRCTION—TWELVE POINTS OF.

1st. The State officers issuing the bonds required no act of the company to identify the bonds.

2d. The companies kept no memorandum of the bonds.

3d. The agents to sell made no representation of any lien.

4th. The purchasers bought them as State bonds simply.

5th. There never was any difference in price between bonds issued to solvent and insolvent roads.

6th. The Legislature always dealt with it as a lien of the State alone—exercising control over it.

7th. The Legislature assert in words that it is a lien for the debt of the State, and is satisfied by a payment of the debt.

8th. The bondholders fund their bonds and coupons into new bonds worth only 50 cents on the dollar, when the liens now claimed, if valid, made their old bonds and coupons worth par.

9th. Payments of interest into the treasury were made in gross, and not to be paid on the identical bonds or coupons, while it was otherwise on indorsed bonds.

10th. The companies in paying the debt to the State took no pains to extinguish the bonds issued to themselves, but paid in any bonds promiscuously.

11th. No bondholder ever demanded payment of his coupons by a railroad company when bonds were below par, and interest unpaid by the State.

12th. No bondholder objected to the substitution bond acts or the actual substitution under them.

This latter fact also is operative as an estoppel

in pais, for these bondholders knew of the proposed substitution, actually approved it by their committee, took legal advice upon it, and then stood by and permitted it to proceed, with the knowledge that millions were being invested in the new bonds.

I have given this summary simply to show that, by the practical construction of the statute, the State, the companies and the bondholders have, for twenty years out of the twenty-seven or twenty-eight years that have passed since the Act of 1852, consistently concurred in the one view which we now present to the court as the true construction of the act, and that all legislative and judicial construction has been in the same line.

The cases on practical construction establish—

1st.—That cotemporary exposition is of great weight in construing an ambiguous law; and that such a cotemporary exposition may be either practical, or may be by way of decision, or by way of legislation, or by means of discussion and debate, or other facts showing the received opinion.

2d.—That practical construction is of weight though it be subsequent to the statute or be merely usage under the statute, or usage with reference to which it is passed, it being alike admissible to explain doubtful provisions.

3d.—That practical construction, where titles are acquired and property invested on it, is entitled to additional weight, because it is against policy to disturb rights and to disquiet society.

4th.—That a court of equity will never interfere against parties claiming under such construction, but would if there were no avenue of escape by

which justice could be reached, leave the parties to their remedies at law—a favorite device of a court of equity where it does not want to do wrong (see 6 Otto. 716). A mere citation of the cases on these points is a work of labor. A full statement of them will be found in the Poston brief, carefully digested.

5th.—That practical construction being sometimes a matter *in pais*, sometimes historical, and sometimes of record, is subject to proof according to the nature of the facts to be established.

See as to statutes: 53 Penn., 61; 63 Barb., 50; 1 La. Ann., 420; 5 Ired., 72; 16 N. H. 252; 16 Ohio, 606; Allison v. Hampton, 9 Hum., 113; Rex v. Loxdale, 1 Doug., 446; 5 Md. 271; 7 Md., 447; 1 Gill and J., 247; 1 Wh., 351; 12 Wh., 210; 2 Head, 332; 22 Eng. L. and E., 437; 18 id., 55.

Construction of contracts: 3 Atk., 577; 16 Johns, 23; 7 Pick., 278; Dane's Abr., vol. 23, p. 363, sec. 16; 10 Mass., 379; 23 Penn., 409; 7 Greenl., 423; 35 N. Y., Supe. C., 28; 37 id., 88; 35 Md., 106; 46 Mo., 127; 16 How., 513; 13 Pet., 93; 25 Mo., 21–2; 46 id., 127.

SUBROGATION TO SECURITIES.

Another point in the argument of counsel for the complainant is that the State of Tennessee stands on peculiarly high ground in her judicial department on the subject of the enforcement of liens in favor of other persons than those to whom they are provided; in other words, giving to others the benefit or liens in favor of sureties. I do not so understand the law of Tennessee or the decisions of its courts. They cite the case of Breedlove v. Stump, 3 Yerger, 257. In that case the real point in controversy was, what was the intent of the

parties and the true construction of their contract. The court hold that the indemnity of the surety was intended to be secured; but from the fact that the collateral was not to be released, either to the pledger or indorser, unless he produced satisfactory evidence that he had paid the debt on the secured paper, and the fact that the indorser secured was in failing circumstances, they declare that the indemnity could only be worked out by a payment to the holder, and that upon the proper construction of the contract, it was an express trust, therefore, to pay the debt, and that no payment to the security and in bad faith, as that was, would be good. Consequently his release given after he had failed could not affect the right of the holder to enforce in equity the right that he had.

In the present case we have none of the indications on which the court there rely to show that it was the intention of the parties that the companies should stand bound for the payment of these bonds to the holder. There is nothing in the contract requiring one of these bonds to be produced and delivered up before the lien is discharged. It is certain that the State was to be intrusted with the means of payment, and was not to be jealously watched as a failing debtor. The case of Breedlove v. Stump is not an authority, then, that the use of the word "*pay*" is conclusive of an intent to secure the creditors, but that, where the intent is manifest, the creditor may have relief according to the intent.

The Saylor's case (3 Heiskell, 525) is perhaps an authority that, where a direct condition in the mortgage is for the payment of the debt of the mortgagor by himself, he being the principal debtor (there comes in then the great difference between

the principal debtor and the man who don't owe a debt), there no payment to the surety, or disposition not passing the legal title, will defeat the right of the creditor.

In that case the debtor and his vendee had merely made an agreement, and the legal title had not passed. It had not been consummated.

But these cases do not establish as the law of Tennessee that no other indication is to be looked to, nor that such an effect is to result without reference to intent. As they place the law of Tennessee on no peculiar footing out of harmony with the holdings of other courts, they do not preclude this court from regarding this case from the standpoint of the common law.

We rely, then, upon the case of Chamberlain v. Sioux City & St. Paul Railroad Company (2 Otto), as an authority conclusive in this case upon that point. But that authority is cited already on the main point, so I will not discuss it again. A review of the cases as to subrogation will show four classes:

1st. Cases of indemnity, in which the courts have somewhat disagreed, some holding to a right to proceed *quia timet*, others that no right existed until damnification. All holding that, in such case, a right of subrogation exists while the parties are in *statu quo*. Nothing in the Ohio cases is inconsistent with this.

2d. Cases where the *status quo*, not having been changed, the courts have, without distinguishing between specific lien and subrogation, granted the relief.

3d. Cases where the *status quo* having been changed, the attention of the court has been called to the distinction, and they have held the lien to exist. Breedlove v. Stump, 3 Yerg. 257.

4th. Where, in like case, they have held that the lien did not exist.

In this last class are the 2d Otto case, the Maryland case I cited above, the opinions of the Supreme Court in the two Missouri cases, and this case before the State courts, and before Judge Trigg, when the same question which is now raised was raised in the Merrian case at Memphis.

In the third and fourth classes, it will be found that the *intention* to create the security for the benefit of the creditor is the controlling fact. In all these, there is, instead of diversity, wonderful conformity and unison as to principle. Perhaps a most critical analysis might discover some difference as to what words suffice to show an intent to secure the debt.

On this subject Breedlove v. Stump is not exceptional, but it finds the intent on sufficient and peculiar facts; Chamberlain v. Sioux City and St. Paul Railroad Company finds a different intent, on a different state of facts, in most respects the parallel of the present, but without all the facts which could here justify that finding.

In Jones v. Quinnipiack Bank, 29 Conn. 25, the obligation to pay and save harmless was held not to indicate an intent to secure the creditor. The same was held in Thrall v. Spencer, 16 Conn.

In Hopewell v. Cumberland Bank of Allegheny, 10 Leigh 206, the words were, "in case Machir (the mortgagor) should fail to satisfy the decree," and,

"in case Machir should fail to pay the note," and these were held not to be an obligation to pay, but, with the circumstances and other matter in the deed, to be intended as an indemnity.

Those are very strong cases. The words in the Missouri bond cases, and particularly in 2 Dillon 206, I have given. Judge Dillon not following the exact phraseology, but giving it the paraphrase that it necessarily must have, says that the agreement *punctually to pay* (instead of provide for payment) the interest and principal of the bonds, does not show such an intent, taken in connection with a transaction exactly similar in its character to the one now before this court.

But there is a case in Tennessee to which I call attention, that I think is peculiarly in point. It is the case of Douglass v. The Planters' Bank (2 Head 699). Douglass & Co., mill owners, gave a deed of trust to secure their merchants at New Orleans upon advances for their flour, which was to be a standing credit, not exceeding $15,000, in acceptances of the factors. At the end of six months, if the millers were indebted, the trust was subject to foreclosure. The holders of the bills joined the factors, who became insolvent, in a bill to have the trust foreclosed for the satisfaction of the acceptances. The principal point in the case was that there was no settlement and no proof of a balance due the factors; but the court also put the case upon the ground that

> The indemnity provided was to secure the acceptor for money actually paid upon his acceptances and not for the security of the indorsee or holder.

There they rely also upon the fact that the mode of payment showed that they were entitled to a settlement, and if they did not owe the factors, then

there was nothing for the holder to reach. That was a case like this in the fact that the acceptances were, upon the face of the contract, intended to be settled by the consignments of flour, as here by consignments of bonds; and it is that fact, showing that the payments were to be made directly to the factor, that enabled the court to say that it was made for the acceptor, and not the holder. There, as here, any other holding might compel the millers to pay twice.

The case of Wood v. Moore, Thomp. Cas. 176, takes the distinction. "There is a plain distinction between a conveyance to secure the payment of a debt and one merely for the personal indemnity of a surety."

I have a few words to say in regard to some cases presented on the other side, and then I will close this long argument.

The South Carolina Bond Case is a very different case from this. There the company was the debtor to the bondholder, and the State was the *guarantor* of the bonds; and the lien was to secure the payment by the debtor of his own debt. There is the great distinction at last, which comes in between this class of cases and the Missouri cases and the Chamberlain case, and this case and the Maryland case. Here the State is the creditor, and the railroad company the debtor, and the security is to secure the creditor, and not a third person. The point in judgment in the South Carolina case, was that an indorsed bond with a security for its *payment* by the maker meant a *payment to the bondholder*—to the payee of the bond. That was very different, and there are other wide differences between this case and the South Carolina case. The

same terms and identical words which make the lien given by the obligor of a bond a security to the holder, his creditor, will make a mortgage of the mere indorser or person transferring, by delivery of another's bond, a mortgage for the benefit of the person to whom he owes his debt. It would be impossible to read the words "for the *payment* of the bonds," in a case where the mortgagor owed the bonds, to mean anything but a payment to the person to whom he owed them. Therefore the South Carolina judges, when they say it means a payment to him, say what they could not possibly avoid. A reading that would deny that, would be a total perversion of the meaning of words in their plain and natural sense as applied to the case to which it was applied in South Carolina.

But as we have shown, where the intent and primary object of the transaction is to secure payment of a debt for bonds, the sense of "bonds" for debt is an admissible and proper use of language. There is one wide difference between the two cases. In like manner it would be entirely admissible to say of an advance of money, "and said money," or "said amount of money, shall be a lien on the property of the said borrower." But, because in South Carolina the words that seem to have been copied from our act were applicable to that state of facts, and are held to their natural and proper construction (because there is nothing to control it), we are not therefore to say that it is to be controlled against its plain and obvious sense, applicable to another and entirely different state of facts. As to that case, we have the statute under which it was decided included in our book of documents at p. 484. Not only does the radical difference which I have pointed out occur, but in that case

there were not the interest provisions, or the sinking fund provisions, which we think are entirely controlling in the act of 1851–52. Nor does it contain the provisions of the 13th section, as to fraudulent bonds, on which we so much rely. Nor was it apparently part of a general system such as ours. With these differences, that case is of no particular value to the gentlemen who have produced it. It will be seen, however, by a reference to the opinion itself, that the Supreme Court of South Carolina had twice before taken a different view of the proper construction of the statute. It is true that the court in that case says, that the question was not in judgment; and I have not, in a consideration of other questions, looked at the cases themselves to see when they were decided or what is the nature of the decision. It is enough to say that the court had twice taken a different view of it.

In connection with this case there is in complainants' brief, p. 176, a citation of Judge Miller's decision in Tompkins v. L. R. & F. S. R. W. There is an effort to make something out of a passing remark upon the phrase, "constitute a lien," which has nothing to do with the point decided. When we come to the decision, which is fully set out in Messrs. Postons' brief, it turns upon the substantial provisions of the act. As the act, like our acts of 1851–2, permits a payment to the State in bonds of the State, the court held that incompatible with a lien for the bondholder.

In Stuart v. James River & Kan. Canal Co., 24 Grattan, 294, the Supreme Court of Virginia held that the fact that the contract was between the State and the company, and that there was no privity between the bondholder and the company,

was fatal to the claim of the bondholder—to a remedy of the bondholder.

The case of Holland v. The State of Florida, 15 Florida, 521, 534, was a case to which I have already alluded, and I simply desire to say in regard to that, that it was a case in which there could be no possible question about the existence of the lien, or the party to whom it was intended to be given. It is exactly the model, it seems to me, that any good lawyer would have framed in his own mind if he had intended to do what these gentlemen insist the lawyers of 1851–52, and this Legislature, intend to do. It provided that—

> All moneys arising from said sale and paid into the treasury of the State as heretofore prescribed shall be *promptly* and *exclusively applied* to the payment and satisfaction of the bonds issued by the State of Florida under this act; and in case the *holders of said bonds* do not present them for redemption within ninety days after said sale, the treasurer shall invest the same or any part thereof which may be remaining in his hands in the securities of the United States, to be held by the State of Florida *as trustee* for the *bondholders* until said *bondholders* shall demand the same, upon which demand the treasurer shall immediately turn over or pay said securities to the *bondholders*.

It seems to me that a better illustration could not be found in the world than that; we have on one hand the entire absence of any allusion to a trust, or any allusion to a bondholder; for I believe literally neither word occurs in any part of the act of 1851–2. How striking the fact is that no such thing occurs there, when it is so plain that it was necessary for the carrying out of the act in the view which these gentlemen take of it. On the other hand, the Florida act is full of the bondholder, the word occurring three times on three lines; and the section is full of provisions for him.

There is another feature in this case: the State

in that case issued bonds to the company; the company issued bonds to the State, accompanied by the lien. The State courts held that the State bonds were void, but the United States Court held that whether the State bonds were void or not, it was a debt which the makers of the bond (the company) had provided a security to pay, and as to them the stipulation was a valid stipulation, and should go with the bond.

In the other Florida case, the decision was based upon the bonds of the company, and it is not worth while to follow it further. It was on a statute precisely identical with, if not the same statute, with regard to the Florida and Savannah Railroad upon which the other case was decided.

The case of Swayzee v. North Carolina Railroad Company, 1 Hughes, was as to a State bond for stock in the North Carolina Railroad Company which was given by the State for a subscription of stock with a pledge of the stock accompanying it in the statute. It was a debt of the State with a pledge of the property of the State (the stock in the company), for the payment of its own bonds. It was preferred stock, and the interest was pledged. There could not be any question in regard to the lien there, and I am utterly at a loss to see what value it can have in this case. As the court says, the intention was manifest; and it seems to me that it was so manifest that in so holding it did not decide anything.

And now, having shown with perhaps superfluous care and labor, that upon the unaided construction of the acts of 1851–2, the complainants have no foundation for their claim, and that there is in the contemporaneous, in the practical construction,

official, legislative, and bondholding—as well as in the judicial construction—a conclusive negation of it, we commend this case to the careful and deliberate examination of the court, in the full faith that we can have only profit and security from the fullest study of the record.

J. B. HEISKELL.

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No. 53 114-663

IN THE SUPREME COURT

OF THE

UNITED STATES.

IN EQUITY.

CALVIN AMORY STEVENS ON BEHALF OF HIMSELF AND THE HOLDERS OF THE INTERNAL IMPROVEMENT BONDS OF TENNESSEE, ISSUED TO THE KNOXVILLE AND KENTUCKY RAILROAD COMPANY,

versus

THE KNOXVILLE AND KENTUCKY RAILROAD COMPANY, AND THE KNOXVILLE AND OHIO RAILROAD COMPANY.

ARGUMENT FOR DEFENDANTS.

WM. M. BAXTER,
Of Counsel and Solicitor for Defendants.

KNOXVILLE, TENN.:
OGDEN BROS. & RULE, BOOK AND JOB PRINTERS AND BINDERS.
1884.

MAY IT PLEASE THE HONORABLE COURT:

The amounts involved in this litigation are enormous, but the main question presented for decision is simple and of easy solution. We venture the assertion that the amount sued for, and the counsel employed, furnish the reason why this cause has attracted that public attention that it has received, and magnified into seriousness a very weak and very vulnerable complaint. We venture a further assertion; that were an ordinary commercial transaction between A, B and C, as is developed in this record, to take place, such a suit as this would never have been dreamed of; and the explanation of this litigation, we imagine, is the desperation of creditors who have millions of dollars of indebtedness against a non-suable State, which they are seeking to hold respondents liable for; or it may have been instituted and is being prosecuted from motives not disclosed in the record, but which are suggested in the cross-examination of the complainant.

Be that as it may, the suit having been brought must be determined, without reference to the motives actuating complainant. The rights of the parties are fixed by their contract and the law of the land, and to a discussion thereof, we will now address ourselves.

To our minds it is purely a construction of the contract as contained in the Act of February 11th, 1852, the acts amendatory thereof, and other acts of the Tennessee Legislature *in pari materia*. It requires no argument to arrive at a proper conclusion. A statement of the admitted historical facts at the time of the legislation referred to and provisions of the contract itself will be sufficient to determine the rights of the parties. It is a fact beyond controversy that in 1850–'52 the bonds of the State of Tennessee sold in the market for par and above par, while the railroads of the State were in their infancy; were uncompleted, and had neither the means nor the credit to finish their roads. In 1879 the state of affairs is exactly reversed. The railroads have good business, ample means and first-class credit, while the State has been in de-

fault for several years in the payment of the interest on her bonds, and the bonds themselves are quoted in the market at less than 40 cents in the dollar This change in the condition of things has brought about a change in the meaning and intent of the Act of of 1852. This is not at all an unnatural conversion of a bondholding creditor. In 1850–'60, while his interest was being regularly paid by the State, he would have scouted the idea that he must look to the *Railroad Companies* for his payments of interest; but so soon as the State defaulted in the payment of interest, and there was no means of enforcing its collection, then it was for the first time discovered that, it was the Railroad Companies and their property and franchises that were liable, and not the State of Tennessee. "The *wish* is father to the *thought*."

It is useless, in the light of history and the facts developed in this record, for complainant to insist that the lien mentioned in the Act of February 11th, 1852, was reserved for the purpose of giving these bonds strength in the market, or that they were purchased by investors and capitalists, relying upon said mortgage as a security. Nothing is farther from the truth. It was well understood by the railroads that a Tennessee bond was equivalent to a $1,000 or more *in cash*; that they were sought as an investment, because the world had undoubting faith in Tennessee's pecuniary ability and honesty, while the bonds of an unknown railroad, endorsed by the State, hadn't the same hold upon the public confidence, and were obliged to be sold at a discount. This was fully understood by the Legislature and the Railroad Companies. The endorsement plan had been tried and abandoned. When the Act of February 11th, 1852, was under discussion, an amendment was offered providing that the Railroad Companies should issue their own bonds, and that the State should endorse them; whereupon it was immediately tabled by a vote of 38 to 32. [See Compilation, page 219 and 220.]

The money market wanted a security of undoubted credit. A bond of the State of Tennessee at that time answered that want. There was no need of any one or anything else being either *primarily* or *secondarily* liable on *her* promise to pay. The bonds authorised by the act and issued thereunder were "bonds of the State of Tennessee," and were sold in the market as such, and upon the strength of her faith and credit alone. The allegations of the bill to the contrary are supported neither by reason nor the facts, nor the swearing of complainant.

The whole theory of the complainant's case is based upon a *literal* interpretation of the following words from the 3rd section of the Act:

"So soon as the bonds of the State have been issued * * * * * * * *they* shall constitute a lien, etc., * * * * * * and the State of Tennessee * * * * * shall be invested with said lien * * * * * for the *payment by said company of said bonds*, with the interest thereon as the same becomes due."

This, with probably one or two other minor phrases, is what complainant hangs his lawsuit upon.

It is a general rule that the words of a statute, if of common use, are to be taken in their natural and ordinary sense, and without any forced or subtle construction to limit or extend their import. 1 *Wheat*, 326; 20 *Wend.*, 561.

But it is also a rule that the *real intention*, when accurately ascertained, will prevail over the *literal sense of the terms*. 1 *Kent. Com.*, 462, 15 *Johns*, 380, 14, *Mass.*, 92; *Dwaris on Stat*, 725. And therefore, it is said a thing which is *within the letter* of a statute is not within the *statute* unless it be within the *intention* of the makers of the statute. *Dwaris on Stat.*, 691. Now, to discover this *intention*, the courts may look to and consider the *subject matter*, the *effects*, and the *reason* of the statute. 2*nd Sneed*, 91.

Let us apply these rules of construction to the statute in question, in the light of the public policy of Tennessee, and the facts surrounding the legislation in question at the time of its passage.

By Art. 11, Sec. 9 of the Constitution of 1834, it was declared that "a well-regulated system of internal improvements is calculated to develop the resources of the State and promote the happiness and prosperity of her citizens; therefore it ought to be encouraged by the General Assembly."

From that time forward, at nearly every session of the Legislature, laws were passed to encourage and aid internal improvements. It was at about this time that the new and almost untried public thoroughfares known as railroads were in their infancy, and occupying the public attention. Turnpikes and plank roads were, or had been for many years, the most approved means of overland freightage. For the building and equipping of these railroads, immense sums of money were required; and in return very great benefits were expected by increase of population and enhancement in the value of all lands in the State. Private capital was not suf-

ficient to launch these large enterprises, and therefore the State policy, engrafted into the Cons titution of 1834. The State hadn't the money in her Treasury to loan to these Railroad Companies, but her bonds were cash, or the equivalent. Through her Legislature she said, "I am willing to raise the money for you, provided you will save me harmless" This proposition was accepted by the roads, and thereupon the law of February 11th, 1852, and various other acts of that session were passed. This act, *in its main provisions*, is based upon, and almost in the language of the act of January 15th, 1852, passed at the same session of the Legislature.

For the present treating the bonds sued upon as having been issued before March 20th, 1860, let us see what the scheme or plan or act of February 11th, 1852, is.

Whenever any company shall make it appear to the Governor that it has solvent subscriptions enough to grade, bridge, etc., its whole main trunk line, and shall have prepared, ready for the iron, rails, etc., the first section of thirty miles, then the Governor shall issue coupon bonds of the State of Tennessee to an amount not exceeding eight thousand dollars a mile, payable at such place in the United States as the President of the Company might designate, bearing six per cent. interest payable semi-annually, and due in not less than thirty nor more than forty years. The bonds were not to be used for any purpose, except for equipping said road with rails, iron spikes, etc., and the Governor is empowered to appoint a Commissioner to act in conjunction with the President of said Company in negotiating said bonds for such purpose, and to act in any other matter where the interest of the State might require it. Sections 1 and 2.

That immediately upon the *issuance* of said bonds for the first section, and *by virtue of the issuance*, the *State of Tennessee* shall be invested with a lien or mortgage, without a deed from the Company, upon the said section, the road-bed, bridges, right of way, etc., for the payment by said Company of said bonds and interest, as the same become due. Sec. 3.

That whenever any additional section or sections of 20 miles shall have been made ready as required by the act, the Governor shall issue bonds as provided in sections 1 and 2, and upon the issuance of said bonds the State of Tennessee shall be invested with a lien upon the first and the additional sections, etc., for the bonds so issued for the payment of said bonds and interest. After the bonds issued for the first section shall have been issued, said Company is prohibited

from giving or creating any lien or mortgage that shall come in conflict with or have priority over the *lien of the State;* any such lien or mortgage is void, and the State's lien is to be prior to any and all claims existing or to exist against said Company. Sec. 4.

That in case any of the property of said Company is sold under the provisions of the act, the Governor shall appoint an agent to attend the sale to protect *the interest of the State*, and if necessary, buy in the road, *in the name of the State;* whereupon the Governor shall appoint a Receiver to operate the same, until the meeting of the General Assembly. Sec. 14.

That the State shall be entitled to two Directors in each Company receiving aid under this act. Sec. 17.

That the State of Tennessee *expressly reserves the right* to enact thereafter any and *all such laws as may be deemed necessary to protect the interest of the State*, and to secure the State against loss on account of the *issuance* of said bonds; but so as not to impair the vested rights of *stockholders* in said Companies. Sec. 12.

These are the main provisions of the act—the provisions creating the debt and lien. The other provisions of the act are for the discharging of them.

By section 5 it is provided that at least 15 days before the interest on the bonds issued to said Company shall become due and payable, the Company shall deposit in the Bank of Tennessee at Nashville (the fiscal agent of the *State*) an amount sufficient to pay the interest, including exchange, commissions and costs, etc., or furnish satisfactory evidence that said interest has been provided for. In case of failure to do so, the Governor shall immediately appoint a Receiver, at the expense of the Company, who shall give bond to the *State of Tennessee*, to take possession of said Company's assets, road, etc., and manage the same, and pay over the profits, etc., under the direction of the Governor, towards the liquidation of said *unpaid* interest. When this is done, exclusive of expenses, to return said road to the Company. In the meantime it is made the duty of the Comptroller to draw from the Treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the Company, as provided for in the act, etc.

If said Company shall fail or refuse to pay said bonds when they fall due, a bill shall be filed in the name of *The State of Tennessee*, setting forth the facts, and thereupon the Court shall make all such orders as may be deemed necessary

by the Court to receive the payment of said bonds with interest thereon, and to indemnify the State against any loss on account of the issuance of said bonds, by ordering the road placed in the hands of a Receiver and sold, or in any such other manner as the Court may deem best for the *interest of the State*. Sec. 6.

No road embraced in this act shall be entitled to State aid, unless it shall, within *four years*, complete at least one section or 30 miles, or, the whole road if less than 30 miles. Sec. 20.

At the end of five years after the completion of the road, the Company shall set apart one per cent. per annum upon the amount of bonds issued to the Company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the Company shall pay into the Treasury of the State after assigning them to the Governor, and as between the State and said Company, the bonds so paid in, shall be a credit on the bonds issued to the Company. And the bonds so paid in and the interest accruing thereon shall be held and used by the State as a sinking fund, for the payment of the bonds issued to the Company and should the Company re-purchase any of the bonds issued to it under this act they shall be a credit and cancelled. In case of failure to comply with this section, the Company to be proceeded against as in section 5. Sec. 7.

The President of the Company shall make semi-annual reports, under oath, showing the condition of the Company, fully, and said reports shall be consolidated every two years by the Governor, and submitted to the General Assembly. Sec. 8.

If at any time the Governor shall receive reliable information that any Railroad Company has fraudulently obtained the issuance of the *bonds of the State*, or shall have obtained them contrary to the provisions of this act, a suit shall be immediately instituted in the name of the State, setting forth the facts; and when it shall be made to appear that said bonds have been so obtained, the Court shall order the sale of the road, lying in this State, its assets, etc., and the Comptroller shall immediately invest the proceeds in stocks, creating a sinking fund as provided in section 7. And the stockholders shall be individually liable for the payment of the bonds so fraudulently obtained, etc., and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such Company, etc. Sec. 13.

For all purposes of notice this shall be deemed and taken to be a *public act.* Sec. 15.

This is the act Now, what is the manifest intention pervading it from the first section to the last? Not a loan of its credit, with only a secondary liability on the part of the State; but a loan of so much money, a loan of its bonds, upon which she alone was liable, primarily and absolutely; and the whole intent and meaning of the Act, and the evident solicitude of the Legislature was to so frame the statutory mortgage that it should be next to impossible for the State to suffer loss on account of the issuance of these bonds, for which *she* was bound absolutely and at all events.

Our first position is that it was the *State's lien* that was secured by that act, and a lien for *her benefit alone.*

In section 1 it is provided that the "bonds of the State of Tennessee" shall issue payable to bearer. If Tennessee was to be secondarily liable, why not have so provided, by enacting that the Company should issue its bonds, and that the State should endorse them? But this very proposition was proposed and tabled.

Section 2 provides that the Governor shall have power to appoint a Commissioner to act, under oath, in conjunction with the President of the borrowing road, to negotiate the bonds, and see that they were applied for the purpose of buying iron rails, spikes, chairs and equipments, upon which the State was to have a lien. Deposition of J. G. M. Ramsey shows that he, as such a commissioner, actually sold the bonds, and paid for the iron himself, so that in this instance the Company never handled either the bonds or money, but received the articles purchased by the State's agent.

Section 3 provides that upon the *issuance* of the bonds and by virtue thereof a lien is immediately created in favor of the State of Tennessee for the payment of said bonds by the Company, and the interest thereon as the same becomes due.

Just here is the rock on which we split. The complainant contends that the phraseology of this section shows that the bonds themselves were to be a lien on the road, and that the Company was bound for the payment of the bonds to the holders thereof, and that the State was invested with said lien or mortgage as *trustee for the bondholder;* while on the other hand we contend that the phraseology of this section, when construed with the other sections of the act, clearly means that the lien is the State's absolute individual property, held for her own benefit, and that "the payment by said Company

of said bonds, and the interest thereon, as the same becomes due," means, not a payment to the holders of said bonds, but a payment to the lender, the State; and that the expression the bonds "shall constitute a lien," etc., means the *amount* of the bonds so loaned, or the debt created by the Company borrowing, or receiving them under the act, shall be secured by a lien, etc.

The bonds had 30 or 40 years to run; and there is only one place in the whole act where the final act of *payment* of said bonds is mentioned, and that is in section 7, where it is provided that the *State* shall use the sinking fund (paid into her treasury by the companies) "for the payment of the bonds issued to the Company."

The other sections in which the word "payment" is used refers to the payment made by the debtor, the Company, to the creditor, the State, on account of the sum loaned, represented by the money realized from a sale of the State's promises to pay. The different provisions of the act are senseless, unless so construed. For instance, in section 5 it is provided that the Company shall pay the interest as therein provided, and in case of failure the road shall be placed in the hands of a Receiver, and operated by him, as the State's agent, until an amount sufficient is realized to pay off and discharge the "unpaid interest;" whereas there could be and would be no unpaid interest, as the Comptroller is expressly authorized, and it is made *his duty*, to draw his warrant on the Treasury for any sum of money necessary to pay the interest due to the bondholder; thus showing that the State was to protect her own paper faithfully and promptly, and then reimburse herself out of the profits of the road. It is idle to suggest that a Receiver could realize enough in less than 15 days to pay interest out of the operations of a road that couldn't pay the interest due on the amount borrowed by it from the State.

Then again, although the bonds and accruing interest were to be made payable at any place in the United States that the President of the Company might designate (and as a matter of fact were made payable in the eastern cities), yet the Companies were to pay the interest 15 days in advance into the Bank of Tennessee at Nashville (the State's then fiscal agent), together with exchange and necessary commissions; or knowing where they had designated the payment of said bonds to be made, they might provide for the interest *there*, furnishing satisfactory evidence to the State 15 days beforehand that

such provisions had been made. Could anything be plainer than this?

Then again in section 13, in case bonds were fraudulently obtained, etc., the stockholders were to immediately be held liable for the "*payment* of the bonds so fraudulently obtained;" and yet said bonds had 30 or 40 years to run!

The construction contended for by complainants involves the inadmissible fact that the State enacted this law looking to the time when she would dishonor her own paper. Else how can they make section 6 consist with their theory? That section provides that in case the Company shall fail or refuse to pay said bonds at maturity, a bill shall be filed in the name of the State setting forth the facts, and thereupon such orders shall be made as will protect the interests of the *State*, and to *receive the payment* of said bonds. It would be presumed by the Legislature that the State would always promptly meet and discharge her own promises to pay. No law would be framed and passed, upon the idea that *she* should be in default. Yet unless this is assumed, how can it be that the bondholders could have any possible interest in such a suit? The very idea of the bondholders having any such interest in such a suit, presupposes the State's faithlessness. Such a construction can not for a moment be allowed. When such a suit would be brought the bondholder would have been paid off by the State. However this may now turn out as a matter of fact, such was the intention of the Legislature, and it can not be presumed for an instant that the State intended to issue her bonds and leave a railroad company to take care of them, and in case the company did not pay them, to let them go to protest, have her credit dishonored, and leave them unprovided for and unpaid, until she could make the money by suit. Surely a construction that involves such admitted bad faith can not be sustained.

In the act of January 15th, 1852, passed at the same session, and of which the act of February 11th, 1852, is practically a copy, we can see what sort of a payment is meant by the Legislature under this legislation. In section 3, it is provided that "so soon as the bonds are issued, etc., upon the issuance thereof, they shall constitute a lien, etc., for the payment of said bonds, etc. Yet, in section 4 it is provided that the Legislature may pass such laws as may be deemed necessary to "provide for the more *speedy* and certain payment by the Company of said bonds, etc. This can mean nothing but *a payment to the State* of the amount of bonds

loaned, and not a payment to the bondholder, whose demand was not due for 30 or 40 years, and *then* due from the State of Tennessee, the maker of the bonds.

The scheme and plan of the act of February 11th, 1852, contemplates and embraces two indebtednesses; one from the State to its bondholders, and one from the borrowing railroads to it, and the act must be construed with reference to such plain intention. In less than ten days after the passage of this act, the same Legislature passed another act (February 21st, 1852), in which it terms the transaction between the State and the Railroad Companies a "*loan*." Section 1 of that act speaks of the bonds that may be *lent* under the act of February 11th, 1852, and other acts of the same session. Section 8 speaks of "the bonds which may be issued under the acts of the present General Assembly *as a loan to internal improvement companies*," etc. Such enactments establish beyond a question the view the State took of the transaction, and make manifest the *intention of the statute*. Now, if this payment was a payment to the State and not to the bondholder, it follows that the mortgage to secure said payment and the lien reserved therefor was the *State's* mortgage and lien, and was not a mortgage or lien for the benefit of the bondholder. If the payment was to be to the State, then the most natural thing for the Legislature to do, was to secure this payment by a mortgage lien, particularly as the State's obligations were out for the full amount represented by the indebtedness of the borrowing railroads to her, and would have to be promptly met at maturity. The idea of supposing that the payment of *her* bonds, then worth from 2 to 4 per cent. premium in the markets, had to be secured by a mortgage upon railroads, can not be entertained without doing violence to common sense. In the first place, there was no *necessity* for it. A statutory mortgage to secure the payment of a security that could be cashed in the market at any moment at more than its face value, would be the most superfluous and useless thing that can well be imagined. And the suggestion that it may have been in the mind of the Legislature that possibly the bonds of the State would go *below par*, and that therefore the statutory mortgage was made to secure them, is a very wild and inadmissible one, and is a suggestion that is born of after events. No such thought was further from the mind of the Legislature in 1852.

The various other provisions of the act are equally emphatic as to whose property said lien or mortgage is. The

"interest of the State" and the interest of the Companies are the only interests recognized in any of the provisions of said act; and primarily and principally it is the interest of the State. If the railroads had not been asking gracious favors, no such mortgage could have been obtained as was obtained; but as beggars could not dictate the terms of the loan, they had to submit to whatever the Legislature chose to enact. "You can have the State's money on the following conditions, and none other," said the Legislature. As 'twas this or nothing, the railroads accepted the offered loan on the terms proposed. These terms consisted of the power given to the Governor, to take immediate and forcible possession of the road through a Receiver, upon failure to pay either interest or sinking fund payments, or for failure to pay any balance that might be due the State when the bonds loaned to it should mature and have been paid by the State; and the further reserved power in the State to call in this loan in any such other manner, or at such other times as might be "deemed necessary, in order to protect the interest of the State."

These were extraordinary provisions in a mortgage. Every possible power to protect itself was reserved by the State in its own hands. There was to be no recourse to law. Like the "unjust servant," the State was so situated that it could seize its debtor by the throat, and demand the payment of its debt whenever it chose to do so, or else throttle its very existence, and destroy its property through a political Receiver.

In section 2, a Commissioner was provided for, to act, under oath, in conjunction with the President of the Railroad Company in negotiating the bonds, and to act in any other matter where the *interest of the State* might require it.

As soon as the bonds are *issued* they shall *constitute a lien*, and the *State of Tennessee*, upon the *issuance* of said bonds, and by *virtue of the same*, shall be invested with said lien or mortgage. Sec. 3.

And so of each section, and when the whole road shall be completed, the *State of Tennessee* shall be invested with a lien upon the *entire road* for the payment of the bonds, as provided in the act, and the Company shall create no other lien of any kind to come in conflict with the *said lien or mortgage of the State;* and the said lien or mortgage *of the State* shall have priority, etc. Sec. 4.

Now, if this were the bondholders' lien, or a lien for their benefit, the first section would be encumbered not only with the bonds issued therefor, but also with the bonds issued for

each succeeding section; the second section for the bonds issued for that section, and also for each succeeding section, and so on. By which means the bonds first issued would have the weakest security (unless for a terminal section) and the bonds last issued, the strongest security, and a great confusion and complication of equities would be brought about. But supposing the entire mortgage to belong to the State for one entire and indivisible loan, and the whole matter is at once simplified, and an intelligible plan made apparent. The creditor, the State, has a lien upon each section as completed, for the loans made upon that section, and also upon preceding sections, and then when the whole road is finished, a lien upon the entire structure for the whole loan. This evidently is the meaning and intention of the statute.

Then the money to pay the interest falling due semi-annually, was to be paid into the State's Treasury (*i. e.* the Bank of Tennessee), fifteen days before the same was due from the State to the bondholder, or in case of failure, the Governor was to appoint a Receiver, who should give bond to the State of Tennessee to faithfully perform his duty as such Receiver, and from the earnings of the road pay over, under the direction of the *Governor*, enough to liquidate such *unpaid interest*. This unpaid interest would be due to the State, and not to the bondholder, because provision is made for the Comptroller to pay the interest due on the bonds whenever the Company failed to furnish the money to pay it with, as provided in the act, by drawing upon the Treasury therefor. And therefore it is that the Receiver would be the State's Receiver, and would give bond payable to the State, and pay over the money under the direction of the Governor, toward the liquidation of said *unpaid interest*. As far as the bondholder was concerned, it would have already been paid; not so, however, as to the State; she must be reimbursed. What sense would there be in his paying over this interest under the direction of the Governor, unless the Governor was representing the creditor, the State? The provision of the statute, that the Company was to *deposit* the money in the Bank of Tennessee fifteen days before the interest became due and payable, was made in order to furnish the State with the means to pay the interest, so that the fund for general expenses would not have to be drawn upon. In case the deposit was not made, then the State was notified that it must furnish the money from its own exchequer, and look to the Company for reimbursement. It was a *deposit* in the Bank of Tennessee, and not a *payment*

of interest to the bondholder, that the Company was bound to make. But it is suggested in answer to this, that the State was the agent of the Companies in paying this interest. But why should the State assume this agency? Why should she require the money to be paid into *her Treasury*, in the first instance? Why this solicitude as to meeting the interest upon obligations on which she was only secondarily liable?

Suit was not provided for, except upon failure to pay the bonds when they should *become due*, or in case any should be fraudulently obtained. In such case the suit was to be in the name of the *State of Tennessee*, and the Court was to make such decree as would indemnify the *State* against loss on account of their *issuance* (*i. e.* the original loan, and not the payment by the State), and to make such other decrees as might be deemed "best for the interest of the State." It has been heretofore shown by another course of argument that the bondholders could have *no possible interest* in such a suit, as they would have been paid in full *by the State* before such a suit was instituted by the State.

The sinking fund provisions make the intention of the Legislature as evident as the sections already discussed. Section 20 enacts that no road shall be entitled to State aid unless within *four* years it shall complete at least one section of 30 miles, or the whole road, if less than 30 miles in length. It is then enacted, in section 7, that at the end of five years after the completion of said road, the Company shall set apart one per cent. per annum upon the amount of bonds issued to the company and shall use such per centum in the purchase of the *bonds of the State of Tennessee*, which bonds it shall pay into the *Treasury of the State, after assigning them to the Governor*, and for which the Governor shall give said Company a receipt, and *as between the State and said Company*, the bonds so paid in shall be A CREDIT ON THE BONDS *issued to* said Company. The bonds so paid in, and the interest accruing thereon, from time to time, *shall be held and used by the State*, as a sinking fund for the payment of the bonds ISSUED TO the Company, and should said Company re-purchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid, and cancelled. Should the Company fail to comply with this provision, it was to be proceeded against as in section 5.

It is evident from these provisions that the sinking fund payments were to keep pace with the amount of bonds issued from time to time. It is as equally evident that it was the

State's sinking fund for the payment (*i. e.* the final payment) of her obligations, which had been issued by her TO said Companies. The one per cent. on the amount loaned to the Company was to be invested in the *bonds of the State of Tennessee*, and PAID into the *Treasury of the State*, after having been *assigned* to the Governor, for which a receipt shall be given, and as between the State and said Company the bonds so *paid in* shall be a credit on the bonds issued to said Company. By these provisions the legal title to said sinking fund is thus passed to the State, and the amount of her bonds purchased with the said one per cent. are PAID into her Treasury. And that the effect of this payment may be beyond question, and shall show to whom the Company is indebted, it is further provided that as between the Company and the State (the debtor and the creditor), the bonds so *paid in* shall be *a credit on the bonds issued to said Company*. This means the *amount* of bonds loaned to said Company, or the debt represented thereby; because the bonds themselves would be out standing in the hands of purchasers and holders, and an actual credit on them could not be entered.

And then again, this sinking fund was to be held and used by the *State* for the payment of the bonds ISSUED TO the Company, *i. e.*, not for the payment of any bonds issued BY the Company, but for the payment of the State's own bonds issued TO the Company, which is equivalent to the bonds *loaned* to the Company, that being the light in which the Legislature looked upon the transaction. As these payments were to be made from year to year, and long before bonds should mature, and in default thereof, the Company was to be placed in the hands of a Receiver, as provided in section 5, these two sections cast a reciprocal light on each other, and show beyond peradventure for whose benefit those provisions for a receivership are, to-wit: for the benefit of the *State alone*.

The original scheme, as set forth in this act, contemplated and compelled the payment by the borrowing Company, of *full* interest on the amount of bonds issued to the Company, even up to the maturity of the bonds, and even after the sinking fund payments should become due and payable; and this is relied upon by complainant, as we understand his counsel, as favoring his construction of the statute. We fail to see how it does. We are free to admit that as between the Company and the State, it was meant that the State should pay nothing; neither the interest nor the principal. The bonds

issued to the Company, and by it sold, were payable in not less than thirty nor more than forty years. During all this time they would be bearing interest; nor could the holders of them be required to accept payment before they matured, so as to prevent interest from maturing and becoming payable. This being so, the Legislature very naturally provided that during the entire period that these bonds were outstanding, the Company to whom they had been issued should pay into the Bank of Tennessee an amount sufficient to pay the interest due from time to time on the bonds issued to such Company The Companies were to provide the means to pay the interest, and were, in addition thereto, to furnish the means to enable the State to provide a sinking fund to meet the bonds when they fell due. As these sinking fund payments were made from time to time, they were to be credited on the *principal* of the debt due from the Company to the State; *i. e.*, on the *amount* of bonds issued to the Company. The only injustice in such a scheme as against the Company accepting State aid under this act is the failure to make any provision for a credit on the interest account, for interest accruing on the bonds issued to the Company, whenever any such bonds should, by accident, be purchased with the sinking fund payments, and paid into the Treasury and *cancelled*. This would doubtless have been done, had it been brought to the attention of the Legislature. Otherwise the scheme was fair and just. The bonds were to run for 30 or 40 years, so as to enable the borrowing Company, by degrees, to pay off the loan, and in the meantime they were to provide the money to pay the interest. The State was willing to *cash her credit* and make the loans to the Companies upon condition of *absolute indemnity*, and the statutory lien or mortgage was created for this purpose, and no other. This is the natural and reasonable construction of this statute. Any other or different construction is forced and unnatural, and does violence to the manifest intention of the Legislature; and the construction of complainant in particular, if adopted by this Honorable Court, would work infinite hardship and irreparable mischiefs.

We think we have demonstrated in what has been already said what is the true intent and meaning of the act of 1852. We are not unauthorized in this construction. It is well settled that in construing statutes, they must be construed so as, if possible, to give effect to every part and make them harmo ize with each other. Particular provisions ought not to be extended beyond the general scope, unless it appears upon the

face of the act that such extension is manifestly designed. *Estate of Tickner*, 13 *Mich.* 44. And if the meaning is either doubtful or obscure, which we do not concede, it is settled by well established rules of construction that it is proper to consider the object contemplated by the Legislature in acts *in pari materia*, as well as contemporaneous and subsequent legislative and judicial expositions, and the *long, uninterrupted and undisputed practical construction given by the officers of the State charged with the duty of executing it, as well as by the community subject to its operation.* *Sedgwick on Statutes*, 247, 250, 252, and 254. *Henry vs. Tilson* 17 *Vermont*, 479. *The Earl of Ailsbury vs. Patterson Doug.* 30. *McKeen vs. Delancy's lessee*, 5 *Cranch*, 22. *The Union Insurance Company vs. Hoge*, 21 *How.* 66. *Bank of U. S vs. Halstead*, 10 *Wheat.* 63.

The popular and practical construction given to this act, and the amendments thereto, by the business men and the people of the State has always been the same, and is the construction that we have given it. The legal profession has been unanimous in its opinion; the judiciary the same; not a dissenting voice. The parties to the contract have never construed it in any other way. And *now*, even if the meaning were doubtful, which we emphatically deny, the construction that has so long been acquiesced in would control. These are all matters, or facts, of which the Court may take judicial notice. "Common opinion," says my Lord Coke, "is good authority in law."

This maxim of Lord Coke has been frequently recognized, and applied by English and American Courts. In 21st How. 66, in the case of the *Union Insurance Company vs. Hoge*, in which the act of 1849 was before the Court for a construction, the Court say, "The practical construction by the public officers of the State * * * * is deserving of consideration. Under the construction thus given, numerous companies have been organized with charters like the present * * and an extensive business carried on in New York and several of the sister States; and although this practical construction cannot be admitted as controlling it is *not to be overlooked*, and perhaps should be recognized as *decisive* in a case of doubt."

In McKeen vs. Delancy's Lessee, 5th Cranch 22, the question was whether a certain deed offered in evidence had been properly proven for registration under the laws of Pennsylvania. Chief Justice Marshall, in delivering the opinion of the Court, says: "Were this act of 1715, now, for the first time, to be construed, the opinion of this Court would cer-

tainly be, that the deed was not regularly proved * * * * But, in construing the statutes of a State, in which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State * * * * It is of some weight that this deed was acknowledged by the Chief Justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another Judge of the Supreme Court. It is also recollected that the gentlemen of the bar, who supported the conveyance, spoke positively as to the *universal understanding* of the State, on this point * * * * But what is *decisive* with the Court, is that the Judge who presides in the Circuit Court for the district of Pennsylvania, *reports to us* that this construction was UNIVERSALLY RECEIVED." There had been no adjudication plead or relied on,—nor does there appear to have been any such decision But upon the assertions made at the bar by counsel, and the report of the Circuit Judge, which the Supreme Court look to as *evidence*,—that they take judicial knowledge of,—they adopt the practical construction that had been universally received throughout the State, because a different ruling would have surprised the country, unsettled titles, and worked infinite mischief upon those who relied on this "common opinion" that had always prevailed. The Court could judicially know a certain construction has always been given by the people of this State to the act under discussion, but the proof is actually before the Court in sworn testimony. There cannot be any question about it, nor will it be pretended by the gentlemen that any other construction was ever dreamed of by anybody, until they were astute enough to invent it out of "airy nothingness."

The Legislative and Executive construction has also been in harmony with the "common opinion." From the passage of the original act in 1852, down to the passage of the acts of 1869 and 1870, these departments have treated the transactions between the State and the Railroad Companies as loans of so much money; as a debt from the Companies to the State, and not to the bondholder. They have always considered the debt represented and called for by the bond, as the State's debt, on which she alone was liable to the holder, and for which the only security was her faith and credit; that the lien created and reserved by the act was her exclusive property, in which the bondholder had no interest whatever, and with which she could and did act as she deemed best for her own

interest and protection. In proof of this the public acts and documents set forth in our compilation are abundant evidence. For a moment, let us direct our attention to them. "All acts," says Loro Mansfield in the Earl of Ailsbury's case, "in *pari materia* with the act to be construed may be taken into consideration." And in another case he declared that "where there are different statutes in *pari materia*, though passed at different times, *and not referring to each other*, they may be taken and construed together as one system and as explanatory of each other." We may therefore, under these and similar decisions, consider the entire legislation of Tennessee on this subject as one system, and as explanatory of the act of 1852. These all concur in showing that the Legislature considered itself at liberty to deal with the security reserved by said act in any manner it deemed necessary for the protection of the interest of the State. Acting upon this view of the State's rights in the premises, it passed an act in February, 1854, "diluting" (as the idea is expressed by one of my associates) the security, by increasing the aid pledged to the several railroad companies from $8,000 to $10,000 a mile. This increased aid lessened in a corresponding *ratio* the security which bondholders are supposed to have had under the original act.

By the act of 1852, the companies to whom bonds were issued were required "at the end of five years" after the completion of their respective roads, to "set apart one *per centum per annum*" upon the amount of bonds issued to them, and use the same in "the purchase of bonds of the State of Tennessee" to be assigned to the Governor, and "paid into the Treasury of the State." But by a statute passed February 21st, 1856, a requisition was made upon said companies to set apart annually *two* instead of *one per cent.*, and to begin to do so five years after the *receipt of the bonds*, instead of five years after the completion of their roads; and instead of allowing the companies to invest the amount set apart as a sinking fund, as provided in the original act, the act of 1856 required its payment into the treasury, and directed its investment by the Governor, Comptroller and the President of the Bank of Tennessee, and the investments were to be made in *any* bonds of the State, without reference to the companies to which or the purposes for which they may have been issued And it was by this act further provided that in the event any of said companies failed to make the annual payments of two per cent. required by the act, the Attorney-General should file a bill praying for a receiver and sale.

Again on March 20th, 1860, an act was passed directing that the money or bonds previously paid by any Company towards the sinking fund, with the interest accrued thereon, be passed directly to the credit of the Company paying the same, and that it should be "*a release*" to the Company for that amount on the debt due by it to the State. And on and after January 1st, 1860, all Railroad Companies that had received bonds were by this act required to contribute annually to the sinking fund $2\frac{1}{2}$ *per cent.* on the amount loaned to them respectively, instead of 2 *per cent.* exacted by the act of 1856. And thereafter, instead of providing, semi-annually, for the interest due on the whole amount of bonds loaned, as required by the original act, each Company (after paying the sinking fund payments, which in all cases were to be entered as credits on the debt), was required to provide only for the interest accruing on the balance of the debt, after said credits were entered.

By an act passed February 21st, 1861, the sinking fund payment of $2\frac{1}{2}$ *per cent.* was suspended for one year. The act of May 7th, 1861, clothed the Governor with the discretionary authority to appoint a Receiver under the original act, or permit the Companies to retain the custody and management of their roads, as in his judgment the interest of the State might demand. Act passed in 1865 authorized the Louisville and Nashville Railroad Company to pay its indebtedness of over $700,000 in other bonds than those originally issued to it. The act of January 18th, 1866, further "diluted" complainant's lien, if he ever had any, by extending it to other and further issues of bonds; and the act of December 7th, 1867, provided for the sale of all roads which should be in default for two years.

On the 25th of February, 1869, after reciting that "it is desirable for the general welfare of the State, that the State shall be reimbursed such amounts as have been advanced to the different Railroad Companies as fast as may be practicable," the Legislature, by an act of that date, authorized the several Railroad Companies to whom loans of bonds had been made, to pay their said indebtedness "in the bonds of the State, in such amounts and at such times as may be practicable." And the better to enable them to do this, further authority was conferred upon them to issue and substitute their own bonds "in lieu of the State's bonds," which substituted bonds, when issued in accordance with the terms of said act, were to take the place of and succeed to the lien reserved to

the State by the act of 1852, and should constitute a "first mortgage" on the "railroad property, franchises, fixtures and materials" belonging to the companies issuing them. And it was further provided that in the event the railroad companies did not avail themselves of the privilege granted by the act, "any person or corporation" could, with the company's consent, pay the indebtedness of such company in the bonds of the State, and become thereby "substituted" and "entitled" to all the liens of the State for its indemnity upon the property and franchises of such company. This act was soon afterwards supplemented by the three acts of July 5th, and December 22nd, 1870, and February 3rd, 1871, providing for and ordering a sale of the roads of the delinquent companies: that is, a sale of the roads of all the companies that had failed for two consecutive years to pay the interest on the amount of bonds loaned to them. These were followed by the act of March 15th, 1873, providing for the funding of the bonds and past-due coupons, and to sustain the credit of the State, upon terms and conditions entirely different from those contained in the act of 1852.

This legislative construction of the act of 1852 is not controlling, but is "entitled to great weight." *Sedgwick on Statutory and Constitutional Law*, 252.

"The legislative history of a statute may be referred to as tending to aid in the construction to be given it." *17th Vermont*, 479.

But we need not stop here. The third co-ordinate branch of the State Government has also placed the same construction on these acts. In the suit of the *State of Tennessee vs. The Edgefield and Kentucky Railroad Company et als.* in the Chancery Court of Davidson county, a court of competent and general jurisdiction, whose province it is to construe statutes, wills and contracts, and try and determine the rights of parties, in proper cases, under and by virtue of the general laws of the land, this precise question was presented by the pleadings for decision, with all parties properly before the Court. Here again the same construction was given, as was universally conceded; and it was therein determined that the bondholder had no lien, and had no interest in the lien reserved, which, it was decided, belonged solely and exclusively to the State of Tennessee. Upon the question of *construction* it seems this ought to be sufficient. If there ever was a case which demanded the application of the sound and just rule adopted by the Supreme Court in the two cases cited, it is

this case. The adoption of a different construction, at this day, would entail untold hardship and injustice, and work irreparable injury. Immense sums of money have changed hands, and sought investment in these railroad properties, on the faith of this "common opinion," and the State has derived the full benefit thereof in a return to her of the full amount in her own bonds, loaned to each of said companies (excepting in cases of sale.) It is impossible to place the parties *in statu quo*. A different construction would surprise the country, unsettle titles, and in effect cause a *double payment of the same debt*.

We presume, as we have the right to do, that all bondholders kept themselves informed as to the legislative, executive and judicial action and construction as aforesaid. But it makes no difference if they did not. The Courts hold that the enactment of public laws, the official communications from the executive to the legislative branch of the government, and the pendency of suits in courts of record of general jurisdiction, and the adjudications pronounced therein, are matters of such public and general character as to be *constructive* notice to all persons whose interest it is to know them; and constructive notice in a case like this, so far as it operates upon the pecuniary rights of parties, is the same as *actual knowledge*. All bondholders had either constructive or actual notice. They knew that the executive, legislative and judicial departments of the State and the business public placed the same construction on the act of 1852 and its amendments. With such knowlege, they remained silent. That silence convicts them, and the Court must infer therefrom, that the construction of the bondholders was in harmony with the *universal construction* always conceded, and now contended for by defendants.

But we are not left to infer this construction from their silence, as conclusive as that undoubtedly is. We have evidence of their *acts*, the effect of which can not be gainsaid. That they bought the bonds, originally, as Tennessee State bonds, relying soley upon the faith and credit of the State, we think we have fully shown was and must have been the case. The evidence is all that way. But as late as 1873 and 1874 we find them (and among them the complainant in this very suit) acquiescing and joining in the construction for which we are now contending.

The act of March 15th, 1873, recognizes all the outstanding bonds of the State of Tennessee as the State's own proper

debt, and provides for the funding of said bonds and the past-due interest *coupons* thereon, in new bonds of the State of Tennessee, for the payment of which "the faith, honor and credit of the State" alone is pledged. Under this act the complainant funded his past-due coupons in the bonds held by him, and so did all bondholders. He also registered his bonds as provided in section 9 of that act, thereby accepting an entirely new security for his debt, if he is to be believed in his present theory. Such an act on the part of the bondholder can not be passed over lightly. Its significance is unmistakable. And besides, during all the years in which the State was in default in the payment of her interest, there was never a demand on the railroad companies for a dollar of interest. As to the correctness of this construction these facts are conclusive. So far as this case is concerned, this *must* be the construction.

But, if the Honorable Court please, had no legislative, judicial, executive or practical construction ever been given to this act and its amendments, and were it now for the first time to be construed, still we insist that the question has been passed upon and closed forever, by the decisions of Courts which this Court is bound to follow. This same controversy has been waged before the Courts where the acts sought to be construed are much more favorable to complainant's view than the one now before the Court. The first and most important in which the precise question in issue arose, grew out of a Missouri statute. The Legislature of Missouri, by the "act to expedite the construction of the North Missouri Railroad," approved December 23rd, 1852, provided that "when the North Missouri Railroad Company shall produce to the Governor of the State satisfactory evidence * * * * * * that the sum of $50,000, collected on capital stock of said company, has been expended in the survey, location and construction of their railroad, he shall cause to be issued and delivered to said company, as a loan of public credit, *special bonds of the State*, to the amount of $50,000 bearing an interest of six per cent. per annum from the time they are *negotiated in the hands of the holders*, payable semi-annually; and after the expenditure of the whole of said sum of $50,000 realized from the sale of said bonds, whenever said company shall produce like proof to the Governor that they have expended the further sum of $50,000 of their own moneys, the Governor shall in like manner cause to be issued and delivered to said company further like bonds to the amount of $50,000;

and in like manner, as often as said company shall from time to time furnish like evidence of having expended from their own moneys collected on their own capital stock, further sums of not less than $50,000 in the construction of their road, and that they have also expended the whole of the proceeds of the sales of bonds previously issued by the State, in the construction of their said railroad, the Governor shall cause to be issued and delivered to said company further like bonds to the amount of $50,000 each time." But "no part of said bonds shall be delivered until the acceptance thereof shall be signified to the Secretary of the State, by filing in his office a certificate of such acceptance, under the corporate seal of the company with the signature of their President." "The certificate of acceptance, so executed and filed * * * * shall become and be, according to all intents and purposes, a mortgage of said road, and every part and section thereof to the people of the State *for securing the payment of the principal and interest of the sums of money for which said bonds from time to time shall be issued and accepted as aforesaid.*" The bonds thus issued were by the act denominated the "North Missouri Railroad bonds," and the faith and credit of the State was pledged "for the payment of the interest and the redemption of the principal thereof." The act further provides that the bonds to be issued "shall be redeemable at the pleasure of the Legislature, at any time after the expiration of twenty years from the date of their respective issues," and "said company shall make provision for the punctual redemption of said bonds so issued as aforesaid, and for the punctual payment of the interest which shall accrue thereon, *in such manner as to exonerate the Treasury of the State from any advances of money for that purpose*," and in case said company shall make default in the payment of either the principal or interest of said bonds, or any part thereof," it "shall be lawful for the Governor to sell said road and its appurtenances by auction to the highest bidder, or to buy the same at such sale for the use and benefit of the State."

There is nothing in the Tennessee act nor on the face of the bonds issued under said act, indicating to the purchasers of them the company to which any particular bond had been issued. But by a subsequent act passed on the — day of February, 1852, the Secretary of State was required to keep a record in his office showing the numbers and dates of all bonds issued to the railroad companies under said act. This provision was solely for the State's benefit, and in order to

enable her to keep her accounts straight with the respective railroads. The Missouri act, on the other hand, directs that the bonds to be issued under it, should be made payable to the order of the President, and be denominated the "North Missouri Railroad bonds," and that the same should be negotiated on the endorsement of the company. Let us see now what became of the "lien of the bondholders" under the Missouri act.

On the 26th day of February, 1865, the Legislature of Missouri authorized the "North Missouri Railroad Company to issue their first mortgage bonds to the amount of six millions of dollars, to be secured by a first mortgage on the line of the North Missouri Railroad. * * * * * And the State of Missouri, for this object, and to this extent only, hereby relinquishes her first lien and mortgage on said main line, retaining, however, a second mortgage and lien thereon"

It was then, as now, urged that the mortgage created by the statute was not exclusively for the benefit of the State, but was also for the benefit and security of the bondholders; that the State, holding the lien as a trustee for the bondholders, could not release said lien without their consent. Under a constitutional provision of the State, this question was submitted by the Governor to the Supreme Court of the State for its decision, and here is the answer:

"We understand the question to be, whether the General Assembly had the constitutional power, by the act entitled 'An Act to Provide for the Completion of the North Missouri Railroad Company,' etc., approved February 16th, 1865, to relinquish and release the first mortgage lien, and pledge of the income of said road, reserved to the State by the act entitled 'An Act to Expedite the Construction of the North Missouri Railroad,' approved December 23rd, 1852, or any other acts, so as to enable the said North Missouri Railroad Company to put another and prior mortgage lien on said road, as provided in said act of February 16th, 1865.

"We have *fully considered* the matter, and are *unanimously of the opinion* that the General Assembly had the constitutional power, by the act aforesaid, to release and relinquish the said first mortgage lien and pledge, for the purpose mentioned in said act of February 16th, 1865." 37 Mo., Reps. 140.

There is no room for argument here. It decides, and decides plumply, that the bondholders had no lien.

The same question came before Judge Dillon in the case

of *Murdock vs. Woodson*, Governor of Missouri, and is reported in 2nd Dillon, pages 188, 212. The facts in that case were these:

The State of Missouri, under the Pacific Railroad act, had issued to this company $7,000,000 of bonds which were outstanding in the hands of *bona fide* holders, for value, and while they were so outstanding and while the mortgage created by the act was in full force, and in the face of a constitutional prohibition against the release by the Legislature of the State's lien, the Legislature provided that said mortgage lien should be released upon the payment by the company to the State of $5,000,000, either in money or in the bonds of the State. The company accepted this proposition, paid the $5,000,000, and took a release of the State's lien in accordance with the statute, leaving the $7,000,000 of bonds issued to it by the State outstanding and unpaid. Thereafter, in 1873, the Legislature, denying the validity of the said release, directed proceedings to be instituted "to protect and enforce all the rights, interests and claims of the State" against said company. Mr. Woodson, the then Governor, concurring in this legislation, and believing the settlement between the company and the State invalid, proposed to credit the company with the $5,000,000 paid by it on the $7,000,000 loan, and sell its road, under the power of sale reserved in the act, for the residue of the original debt.

Just at this point, Murdock and Clark, the trustees of the mortgage made to secure $5,000,000 of bonds issued by the company to raise the means to enable it to settle with the State, filed the bill in the Circuit Court of the United States to enjoin Governor Woodson from selling the company's road, as he was proposing to do, thereby ignoring the settlement referred to. In opposition to complainant's suit, the Governor urged the supposed vested rights of the holders of the State's outstanding bonds, and their lien under the statutory mortgage. He claimed that the mortgage created by the original act vested them with rights which the State, by subsequent legislation, could not impair, and that the power of sale reserved in said act, and with which he was clothed, was for their benefit; and that the company having been long in default in the payment of interest, he ought not to be restrained from executing the trust reposed in him by making a sale of the property. But Judge Dillon, after stating the argument, as above substantially stated, said: "I am inclined to think, however, that the form of the transaction indicates the *inten-*

tion of the parties. The State issued *its* bonds, and these were negotiated and taken up on the State's faith and credit, without any accompanying security. To indemnify *itself*, the State provided for a mortgage upon the road of the company and a pledge of its tolls and income." This holding of Judge Dillon, upon appeal, was affirmed by the Supreme Court of the United States, in the case reported in 22*nd Wall.* 351, under the style of *Woodson vs. Murdock*. Though this precise question was not made in argument, nor noticed by the Court in its opinion, still it was directly involved, and necessarily included in the affirmance of Judge Dillon's decree. It will be noticed that it was the principal ground of defense in Governor Woodson's answer, and couldn't by any possibility have been overlooked. Throughout the opinion the debt is regarded as the debt due by the company to the *State*, and the lien is looked upon as the *State's* lien, so that when the debt is paid to the creditor, the *lien is extinguished*.

Of like import is the decision of the Supreme Court in the case of *Chamberlain vs. The St. Paul and Sioux City Railroad Company*, 2*nd Otto*, 299. The complainant was the holder of certain Minnesota State bonds issued in 1859, to the Southern Minnesota Railroad Company, under the authority of a constitutional amendment, which declared that the company to which the bonds were issued should "make provision for the punctual payment and redemption of all bonds issued and delivered to it," and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of the State from any advances of money for that purpose; and as security therefor, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land free from prior incumbrances, which said company is or may be authorized to sell, in trust for the better security of the treasury of the State from loss on said bonds; * * * * * * * and in case either of said companies shall make default in the payment of either the interest or principal of the bonds issued to said companies by the Governor, no more S ate bonds shall thereafter be issued to said company, and the Governor shall proceed, in such manner as shall be proscribed by law, to sell * * * * * * the lands held in trust as above." These bonds were styled "*special* bonds of the State," and were to be denominated "Minnesota State

Railroad bonds;" to be signed by the Governor and countersigned, and *registered* by the Treasurer, and were made payable to the order of the President of the company. The principal and interest were to be paid by the company to the holder, *in money*. There was no reserved power to further legislate, etc. These marked differences from our statute must be borne in mind.

The company having defaulted, the mortgage was foreclosed, the 240 sections of land bought in by the State, and subsequently turned over to another railroad company "free from all claims and liens." The faith of the State was pledged for the payment of the bonds sued on. "The State," say the Court, "is bound by every consideration of honor and good faith to pay them. Were she amenable to the tribunals of the country as private individuals are, no court of justice would withhold its judgment against her in an action for their enforcement But complainant finding no relief from the pledged faith of the State, and being unable to pursue any remedies at law against her, on her bonds, seeks to charge with their payment the two hundred and forty sections of land mortgaged by the company," and purchased by the State at the foreclosure sale. Upon these facts complainant's counsel contended that "the position of the State in relation to the bonds is that of an accommodation maker of negotiable paper She is simply a surety. Hence, upon the doctrine of subrogation, the conveyance by the mortgagor company to the State, to indemnify her, created a trust in favor of the holder of the bonds, and appropriated the property, etc. conveyed, as a fund for the payment of the bonds;" the exact position, as we understand it, assumed and sought to be maintained by complainant in this case.

The Court say, "the position of complainant is, that notwithstanding the form of the contract, the original company is in fact the principal debtor and the State its surety; and, that as the creditor is to be paid, he is entitled to have the securties taken by the State applied to the payment of the bonds held by him; that said lands became the property of the debtor company; that the subsequent interest of the State under the trust deed and mortgage was only the right to hold them as surety against loss upon its bonds; that this interest was not changed by the foreclosure and purchase by the State; and that the lands passed to the defendant company with notice of the trust"

After thus stating complainant's position, the Court goes on to say:

"The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity and which may be used, if necessary, for the payment of the debt, is not questioned. The security, in such a case, is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand. the property deposited with the surety for that purpose if required by the default of the principal. But in this case the deed and mortgage to the State *were not intended to create a trust in favor of the holders of her bonds.* The State was primarily liable to the holders; and it was only as between her and the company, that the relation of principal and surety existed. *It may be doubted whether the bondholders could call upon the company in any event.* The endorsement made by the President, simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to secure the payment of the bonds held by him, was one resting in equity only. It was not a legal right arising out of any positive law, or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a Court of Chancery, against the surety. But the State being the surety here, it could not be enforced at all, and not being a specific lien upon the property, can not be enforced against the State's grantees."

These adjudications, as we think, are exactly in point, and conclusive of the case in hand.

We have endeavored to show, and we think we have shown that the practical, contemporaneous, legislative, executive and judicial construction of this statute has been right in the face of the theory of complainant; and were it an open question that our construction must prevail. But we have further shown that the question is not an open one; that it has been closed by the adjudications hereinbefore invoked as well as by the construction placed upon it by the complainant himself, In all that we have said, however, we have discussed the question without reference to the reserved power as contained in section 12 of the act of 1852, to further legislate in any manner that might be deemed necessary to protect the interest of the State.

If the complainant fastens his hopes and his rights upon the act of 1852, he must take that act in all its parts. He

can not make his selection as to what he will take and what he will leave. He must take it as a whole or not at all. The State reserved the right in the 12th section "to enact by the Legislature, thereafter, *all such laws as may be deemed necessary* TO PROTECT THE INTEREST OF THE STATE *against any loss in consequence of the issuance of bonds under the provisions of this act;* but in such manner as not to impair the vested rights of stockholders." If the State is a trustee for the bondholders, as is contended for by complainant, here we find in the very act creating that relation, a provision which gives to the State the power to do anything the Legislature may *deem necessary* to protect her interest and secure her against any loss in consequence of the issuance of the bonds held by her *cestui que trust;* for let it be always borne in mind, that the State was bound for the payment of these bonds and the interest thereon. Whether primarily or secondarily, it matters not She was bound for their full and punctual payment. So long as she acted in good faith, her power to protect herself was unlimited. It extended to any act her Legislature *deemed necessary*, whether actually necessary or not. The only restriction upon her powers was as to the vested rights of stockholders in the borrowing companies. There is no restriction as to the rights of the bondholders. How then, does this act benefit complainant? How is it possible for him to complain of the exercise of a power reserved in the very act under which he claims? This union between him and his alleged trustee is an indissoluble bond, "for better, for worse, for richer, for poorer." Assuming that complainant will admit, as he can hardly avoid doing, that he takes the act of 1852, *cum onere*, it is argued in reply that, under that act, the bondholders acquired a vested right in the shape of a lien upon the property of the borrowing roads, and that any subsequent legislation impairing that right is unconstitutional and void. But this is begging the question; because the act provides that the State may legislate as it chooses. The bondholder accepts with this condition annexed. He assents beforehand to the State's doing anything and everything deemed necessary for her own protection; and to argue that acts of the State assented to by him are in violation of his rights, is a *non sequitur*. It is bad morals and worse law. But let us look at the reasonableness of complainant's position In the first place, it must be remembered that before any of the bonds sued on were issued, the State had exercised this power reserved in the 12th section; and certainly no complaint can be made of this, as

the loans were then made under the original act *as amended*, and the State, the companies and the bondholders (arguing now upon their theory) had just such rights as the act, as amended, gave them, because these amendments became a part of the original act. But without noticing this for the present, what would have been the effect, should we adopt the complainants' theory as to the unconstitutionality of these amendatory acts? Their trustee, as they say, the State, was issuing her bonds at the rate of $8,000 and $10,000 a mile on twenty or thirty railroads contemplated and being built. In all, they amounted to many millions of dollars. "They thronged the channels of commerce, which they were made to seek, and found a market. They passed from hand to hand like bank notes," (2*nd Otto*. 449). They were in the hands of various and numberless holders throughout the civilized world—in the possession of A to-day and of B to-morrow. If the holders thereof became invested with a right that the State *could not* impair, without their consent, then we are reduced to the certainty that the State really became bound, hand and foot by the act of Februrary 11th, 1852, with no possible chance of protecting herself in any possible event. The Legislature was laboring under a woeful mistake in supposing it had any right to enact any law in future for the State's protection, and the 12th section was worse than a nullity. The impossibility of securing the consent of the bondholders, scattered over the world as they were, will at once suggest itself to the mind of the Court. By the facts shown in the reports of the Presidents of the roads, and condensed by the Governor from time to time, and submitted to the Legislature, it might become evident that it was necessary to take immediate steps to foreclose the statutory mortgage, or to take some other step to protect the State; and yet, without the consent of the bondholders, the State would be *without the power to do so*. And how could this assent be secured? How could these bondholders be hunted out and their consent obtained? What would become of the security in the meantime? And when that consent might possibly be obtained, before the Legislature could be convened and take any step in the matter the bonds, many of them, would have passed into other hands, without notice of any such consent being given, and immediately all the difficulties originally standing in the way would be renewed. In other words, it would have been practically impossible for the State to have moved one inch in the matter, after passing the original act. The larger part of the security was of a perish-

able nature; the depots, the rolling stock, the iron rails, the bridges, the masonry, etc.; nothing of permanent value, except the unpaid subscriptions, and the grading and the franchise. Thus tieing the hands of the State, not only made it impossible for her to protect herself, but also made it absolutely impossible for the State to protect the *primary security* for the bondholders' debt as they now insist And they now present themselves in the very inconsistent attitude of having the benefit of what they say the State had no right to do; for it is clearly shown that had not the State taken the steps she did take, the security now relied upon would have been long since practically worthless. It is astounding to see gentlemen insisting upon a construction that would render the State so utterly helpless, and a construction that does violence to every element of business judgment and common sense. The security taken was more for the benefit of the State than for the benefit of the bondholder, even under the theory of the complainants; for the bondholders couldn't avail themselves of the security until both the principal and indorser failed, or were unable to pay; and yet this being the fact, they assume (or their construction results in that) that the State took a security for her indemnity (and in equity for theirs') and in the same instrument so tied her hands that she could take no step whatever to *protect* that security, *without their consent.* This would make the 12th section "sound and fury, signifying nothing."

Let us now see what was done under the power reserved in this 12th section, affecting the rights of complainant and these defendants. On the 1st day of July, 1870, the State Legislature, after reciting that the time had arrived when the interest of the State in the defaulting railroads should be sold, and the people relieved of the burden pressing upon them, and the credit of the State restored, which could be done by enforcing the legal rights of the State against such roads, passed a law appointing the Governor, the Secretary of State, the Comptroller, R. J. McKinney. F. B. Fogg and Archibald Wright, Commissioners to sell the mortgage of the State, provided a sufficient sum could be realized to pay the amount due from each company, and the unpaid interest; and giving to the purchaser or purchasers the right to discharge the purchase price by an equal amount of State bonds issued to said railroad company or *for any other purpose.* Power was also given to the Commissioners to put the purchaser in possession. In case the full amount of the State's debt could not

be realized by the Commissioners, they were empowered to advertise for sealed bids, and were to report the best bid, (for any and every delinquent road), to the Legislature, with such recommendations as they might think best for the interest of the State.

In pursuance of the power conferred by this act, the Commissioners made an effort to sell the State's interest, and failing to do so, they made a report to the next General Assembly in December, 1870, setting forth the obstacles that had prevented and would prevent a sale by them, and recommended further legislation. [See Compilation, pages 388, 396.] In this report we find, for the first time, in any official paper, a suggestion—probably as expressing the fear of some timid capitalist—put in the form of a question, whether or not the bondholders had a lien on the property of the borrowing companies. This, however, did not change the one, uniform construction; but in order to cut off all possible question, the Commissioners recommended the institution of a suit, in which all questions might be decided. In consequence of this report, the Legislature, on the 22nd of December, 1870, passed an act authorizing and directing a bill to be filed, at once, in the name of the State, in the Chancery Court of Davidson county, against all the delinquent railroads, and conferring upon said court full power and authority to determine any and every question that might or could arise in said litigation. These powers the Court possessed before the passage of that statute, in any and every case where it had jurisdiction of the person. No special power was given to this Court other than it had before. It was one of the regular constitutional courts of the State, already in existence, and was chosen for reasons of convenience solely, being at the capital of the State. There was nothing specially noticeable in that act. Aside from the fact that all the roads might be and were directed to be sued in one suit, and that the time within which appeals and writs of error might be prosecuted was shortened, there is nothing unusual in it. But as the State had a right to litigate in any of her Courts, and as her public debt was increasing at the rate of $2,500 a day, it was a wise and proper exercise of the legislative power, to provide for a speedy determination of the questions involved. Nobody's rights or pretensions were overlooked. The companies, the respective stockholders, the holders of bonds, creditors, and all persons interested in the several roads were to be made defendants. It was also provided by said act that the pur-

chaser at the sale to be made under and by virtue of these judicial proceedings, might pay the amount of his bid in "*any of the outstanding legal bonds of the State.*" In view of the reservation in the 12th section of the act of February 11th, 1852, these acts are clearly constitutional. *Peik vs. Chicago and Northwestern Railroad Company, 4th Otto.* 170 and *cases cited.* If, however, we are correct in our construction of the act of 1852, this question can not arise.

In pursuance of this act, to-wit: on the 20th day of January, 1871, a bill was filed in the Chancery Court of Davidson county, in the name of The State of Tennessee *vs.* The Edgefield and Kentucky Railroad Company and other delinquent railroad companies, and among the number The Knoxville and Kentucky Railroad Company. To these proceedings the stockholders of the several companies, the holders of the bonds issued to them, the creditors and all persons who had any interest in any of said roads, were all regularly made defendants, by process and publication as required and allowed by the law, (*Code* 4352), and the rights of all parties legally submitted for adjudication. The very identical question in issue in this case was presented for decision. The cause was regularly prepared for hearing, proof was taken, and everybody had a day in Court and aright to be heard. The proceeding was open and notorious; it was in pursuance of a public act of the State Legislature, and was pending, as to the rights of the parties thereto, for fully a year. Complainant, if he was then a bondholder, is supposed to have been looking after his own interests, and to have had actual notice that the act authorizing said suit had been passed, and that proceedings had been commenced as therein directed. The notice given him by the passage of that act, and by the publication provided by our statutes and allowed by the general rules of Chancery practice, was *constructive* notice, and was all that was required, and as much as he was entitled to receive. And the proceeding being one *in rem*, is binding upon all unknown and non-resident defendants having an interest in the property proceeded against, who were brought before the Court by publication. *Pennoyer vs. Neff, 5th Otto* 714.

As to all defendants failing to answer, judgment *pro confesso* was regularly taken, and the cause proceeded with. The rights of all parties were adjudicated and fixed by the decrees in said cause, proof was taken ascertaining the amount due from the delinquent railroad companies to the State, and the value of the property of each road upon which the State had

a lien for such indebtedness. These matters being ascertained, and the companies being given an opportunity to pay off the amounts found to be due from them, and failing to do so, a sale was ordered and the property sold. It had been determined and decided in this cause that the uniform, universal construction that had always been given to this statute of 1852, was the correct one; that the lien was the absolute property of the State; and that the debt due by the railroad companies, was a debt due to the State of Tennessee, and not to the bondholders. Under this state of facts a sale was made, open to the world, and the roads were purchased by innocent parties, who paid their money upon the faith of these judicial proceedings. The sales were reported to the Court, time was allowed for exceptions to be filed, and said sales were then permitted by the parties to be confirmed without exception (so far as the K. & K. R. R. is concerned) and decrees were passed divesting and vesting title, and conveying the absolute fee. The purchasers paid the amount of their bids, and were placed in possession. They have expended large sums of money in equipping, repairing, extending and reconstructing these wornout and dilapidated properties. They have issued first mortgage bonds thereon, which have been put upon the market as such, and have been sold by the companies, and bought by purchasers, upon the faith of their being what they purport to be, and upon the regularity and conclusiveness of these judicial proceedings. Millions of dollars have changed hands by reason of the premises, and sought investment in these new securities. But during all this while the bondholders now before the Court, with a full knowledge of the facts, stood quietly by; entered no dissent; took no appeal; prosecuted no writ of error, and gave no notice of any kind to any of these purchasers of the delinquent railroads, that they had or claimed to have any lien against the property that the defendants had bought and were improving and expending money upon, and charging with a new and independent lien purporting to be a first mortgage.

Such conduct upon the part of complainants, and such *laches* in making known and asserting their claims works an estoppel that peculiarly justifies the wisdom of that principle of law that prevents a complainant, in such a case, from perpetrating so gross a fraud under the forms of law. There was a time when the law said "speak, or else forever after hold your peace." Not having *then* spoken, he can not now be heard. The complainant, however, seeks to avoid the force

and legal effect of these facts, by charging in his bill that the Legislature acted fraudulently in enacting the laws of 1869–'70, and in selecting the Chancery Court of Davidson county as an instrument to carry out its purposes This charge is a malicious and reckless thrust at the integrity and honesty of all the branches of government in Tennessee, the legislative, executive and judicial; without proof to support it, absolutely groundless and gratuitous, grossly scandalous and impertinent, and *without legal effect, even if it were true.* Fraud can not be imputed to the Legislature. This was so well known to complainant's counsel that the insertion of such a charge in the bill is inexcusable; and in the face of the facts, inexcusable is a very mild word.

In enacting these laws the Legislature displayed great wisdom There was urgent necessity for doing all that was done, and it was characterized by the utmost good faith. In common with several other roads, the Knoxville and Kentucky Railroad had been placed in the hands of a Receiver. It wholly failed to pay its expenses, and was being operated at very great loss to the State and to the stockholders of the company. The interest due upon the amount loaned to it was accumulating daily and the State was unable to meet it. The rolling stock was getting old and unsafe, the cross-ties rotting, the iron rails wearing out, and things generally going to pieces; and the company, hopelessly insolvent, was without the means or credit to operate the road successfully. Ruinous loss was inevitable under this state of things, and it became absolutely necessary for the State to do something to protect herself. With no motive or purpose except to free herself from debt, the judicial proceedings directing a sale were authorized and instituted. In protecting herself and in repairing her own credit, the interests of the bondholders were furthered; not ignored, and their rights impaired as is charged. There was but one alternative—either to bring the roads to a sale, or let their property go to waste and ruin. Believing that the power to make a sale was reserved in the 12th section of the act of 1852, and that the necessity therefor was pressing and apparent, a sale was made, as hereinbefore shown. In any view such a sale was proper, whether the lien belonged alone to the State, or whether she held it as trustee for the bondholers; for even upon the latter theory, such a step was necessary, in order to realize anything out of the trust property for the benefit of the *cestui que trust.*

We therefore feel justified in saying that the charge made

is unwarranted by the facts, unsupported by evidence, contradicted by the truth, and a useless and malicious libel upon the Legislature of Tennessee. It is an attempt to make abuse take the place of argument and learning. As a legal proposition it is unworthy of notice. Apart from that, however, as citizens of Tennessee, we indignantly repel the charge as unprovoked and grossly false.

There is another point made in argument by complainant's counsel, and earnestly pressed upon the Court. In a very elaborate brief, prepared by complainant's senior counsel and filed in the case of *Merian and others vs. Duncan and others*, lately pending in the Supreme Court of the United States, a line of argument was undertaken, that we presume will be followed in this case. The principal question involved was the same as is presented in this record. After setting forth fully their construction of the act of 1852, and arguing that by reason of that act the bondholers became vested with rights that no subsequent legislation could impair, the following position is taken: "A mortgage given for mere indemnity, *a fortiori*, a security such as this, to provide for the payment of the debt, as well as for indemnity for the debtor, inures to the benefit of the creditor, and may be enforced by him, in equity, notwithstanding any collusive attempt by the trustee and debtor to deprive him of his rights."

This familiar principle, announced with such seriousness, and supplemented with such ostentation of learning we have no disposition to contradict. Our reply to it, if one be needed, is that neither the principle itself nor the authorities numerously cited to sustain it, has the slightest application to the case now under consideration. The principle contended for is clearly recognized and distinctly announced in the case of Chamberlain *vs.* The St. Paul and Sioux City Railroad Company, to which we have called the attention of the Court in a preceding part of this argument.

"A mortgage executed by a debtor directly to his surety, to be void if the debt is paid, is for the security of the creditor as well as the surety," (*Saylors vs. Saylors et al.* 3*rd Heisk.* 525), and a creditor may maintain a bill in equity to secure to himself the benefit of such security. But if we are correct in the construction that we have given to the act of 1852 and its amendments, by which the rights of the parties to this action must be measured, this is not a case where a mortgage has been executed by a debtor to his surety, but a case in which a lien has been created in favor of the *creditor* upon the

debtor's property; and hence the authorities relied upon by complainant's counsel are not applicable. If that construction is correct, the railroad companies are (or rather, were) debtors to the State, and the State is a debtor to the bond holders, and therefore the authorities relied upon can have no pertinency whatever to this case. Those authorities are based upon a state of facts, showing that both principal and surety are common debtors to a common creditor; between whom, *as to the debt*, there is privity of contract. In this case there is no common debtor, nor common creditor. There is no privity of contract There are two distinct debts, two distinct debtors, and two distinct creditors. In one case the railroad company is debtor and the State creditor. In the other, the State is debtor and the bondholder is the creditor. But even supposing that the hypothesis upon which complainant's counsel argues were correct, to-wit: that the railroad company is the principal debtor, and that the State is a surety and trustee of the lien reserved by the statute, still it will be found that the authorities cited have no relevancy to the facts of this case. Admitting that the lien reserved by the statute in favor of the State, is a lien for its indemnity as surety for the defendant company (which strikes us as an absurdity) and that complainant, under the authorities adduced, is entitled in equity to enforce the same for his benefit; yet he must take the benefit of that lien, under the contract and *cum onrere*. He must work out his equities through the State. He can claim no more than the State could demand and enforce, if she were the complainant seeking relief. He must take the lien together with all the stipulations contained in the contract creating it. That contract is the act of 1852. That contract provides that the surety might at any time in the future, and without the assent of the railroad company, pass any law, or make any change of the contract, in reference to her protection, that she might deem necessary. Before binding herself as surety, she had a right to make any stipulation she chose, with reference thereto. Surely there can be no objection urged against such a right. The property upon which a lien was taken was the railroad company's. The suretyship was a matter purely voluntary upon the part of the State. The debt in this case was not to become due for forty years. The property taken in pledge, or upon which a lien was created, was, much of it, perishable, and liable to great fluctuations in value. Unforseen events and contingencies occurring, might make it absolutely necessary for the surety to take into her

own possession long before the maturity of the debt, the pledged property, in order to prevent a total loss. Is there any valid, legal objection then, to the State's inserting this 12th section in the contract at and before the time when she assumes the liability of surety? And in case such a provision is inserted, would a creditor, afterwards coming into the ownership of the debt on which the surety is bound, acquire such an equity in the property pledged, as would deprive the surety of exercising the right reserved, without the consent of the creditor? Could the creditor stand by and say, "I have such a vested equity in the property pledged or mortgaged, as deprives you of the right to sell it, as you have stipulated in your contract with your principal?" To so hold is to give to a creditor higher equities than the surety to whose rights he seeks to be subrogated. To so hold would be to allow creditors whose consent it would be impossible to obtain, to stand by, clothed in their "vested rights," and thereby prevent a sale, to the ruin of both principal and surety, and the decay and destruction of the property. It seems almost too plain for argument, and to state the logical and inevitable results of the position assumed by complainant, shocks not only the reason and conscience of the Court, but makes manifest the injustice and absurdity of the attempt to put "new wine into old bottles." The principle contended for by complainant's counsel is old and undisputed, but the case they are attempting to make it fit is full of new facts that can not be confined within the circumference of that principle. In no case cited was there any such provision in the mortgage as we find in this one, and the facts of a case always determine what principle or principles of law shall be applied to them.

But this is not all. In a case where a power of sale is reserved in the mortgage, for the better protection of the surety, it is well established that both the principal debtor and creditor must intervene and assert their equity *before* the surety shall have made such disposition of the property. The surety having the power to sell, and having honestly and fairly exercised that power, and subrogation being a right in equity only, whenever the surety becomes legally divested of all rights to and over the pledged or mortgaged property, there is nothing left for equity to operate upon. The principle is thus stated in *Hopewell vs. The Cumberland Bank*, 10*th Leigh*, 200; "*The party who seeks to be subrogated must show that the party to whom the property is pledged, or any other counter security given, has or would have the right in the contemplation of a*

Court of equity to claim the benefit of the indemnification, by being liable for the debt or obligation, or entitled to charge the fund pledged, and that the plaintiff has a subsisting equity to enforce the lien or counter-security in the same manner as if there were an actual cession of the action."

Can it be pretended that the State now has or would have the right, in the contemplation of a Court of equity to charge the fund pledged, under the facts in this case? Has she not already disposed of the mortgaged property and appropriated the proceeds towards the payment of her own debts, and in indemnifying herself against loss on account of the issuance of the internal improvement bonds? Can the same property in the hands of an innocent purchaser be again charged by the bondholder for the same debt? Can the bondholder be subrogated to rights not now possessed by the State? The facts are a sufficient answer. Before making the loan the State did contract that she was to have a lien upon the property of the railroad company to protect her against loss on account of the loan; or *suretyship*, if you please. She further stipulated with the company that she should have the right to deal with that lien or mortgage in any manner whatsoever, and at any time it seemed necessary to do so for her own protection. This stipulation was in the face of the contract of suretyship. Long before the bonds became due, it became apparent that the company could neither pay the interest falling due semi-annually, nor the sinking fund payments. The statutory receivership was applied, but without avail. The power reserved in the contract to sell the surety's interest in the lien or mortgage was thereupon honestly and fairly exercised. The State did sell, and thus divest herself of all interest in said lien, taken for her indemnity, and received a full and fair price for the same, and fully equal to the cash value of the property mortgaged. Neither the company nor the bondholder interposed any objection, as they might and could have done, if their theory is correct. There was no collusion of any kind between the surety and purchaser. By what principle of law or equity then, can it be insisted that there is left any right of the surety or principal debtor, to which the bondholder can be subrogated? Before the bringing of this suit said lien had been legally extinguished; and the State, by her own conveyance, is forever estopped to set up any sort of claim or equity against the purchaser of the mortgaged property. The virtue has departed out of her, and there now remains nothing upon which a Court of equity can

operate, in accordance with the doctrine of subrogation. As applied to the facts of this case, the doctrine of subrogation is delusive and fallacious.

But even supposing this were a case for the application of the principle of subrogation, still it ought not to be enforced. All parties should be before the Court; the creditor, the debtor, the surety and the purchaser. If complainant is entitled to be subrogated, as is insisted, then the Court ought to be so situated as to be able to do full justice. If the property now claimed by the purchaser is not his, as against the creditor, then his purchase money and interest should be refunded, and his other equities decreed and enforced as against the surety. All parties should be placed *in statu quo*. This it would be impossible to do. The State is not and can not be brought before the Court. If she were, no decree against her could be enforced. The bonds paid to her as purchase money have been cancelled and destroyed. They could not be supplied; and if a judgment for their value should be pronounced, how could it be enforced? Upon the face of the contract the State, the trustee, was empowered to sell and authorized to collect the money, and if there had been an actual misapplication of it, the title to the property, in the hands of the purchaser who bought in good faith, can not and ought not, to be affected by reason of such facts. The equities are all on the side of the purchaser, and where such manifest injustice and irreparable mischiefs would follow in the wake of a decree applying that principle to this case, it ought not to be applied; leaving out of view all other questions.

The defendant, The Knoxville and Ohio Railroad Company, pleads and relies upon, and is protected by the statute of limitations. The Code of Tennessee, section 2763, is in these words: "Any person having had by himself, or those through whom he claims, seven years adverse possession of any lands, tenements, or hereditaments granted by this State or the State of North Carolina, holding by conveyance, devise, grant or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity, commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title."

We are perfectly aware of the exception to the statute of limitations, when the same is sought to be applied in favor of the holding of an express trustee, or mortgagor remaining in

possession. This distinction runs through all the books and learning on the subject. The reason of the exception is that, the holding of the express trustee or mortgagor is in harmony and consistent with the rights of the *cestui que trust*, or mortgage. The implication of law is that the holding is in accordance with the trust relation, and for the benefit of the parties entitled. In such cases there has to be an actual disclaimer brought to the knowledge of the beneficiary, and an adverse holding from that time forward, for the period prescribed by the statute; or a surrender of possession to the party entitled, and an adverse holding thereafter under another title. 10*th Yerger*, 382, 4*th Yerger* 104 and *Perry on Trusts* 864. We are therefore free to admit that *if there was an express trust* between the State and her bondholders, or between the borrowing company and its creditors, then the statute of limitations would not run in favor of either the State or the company, as against the *cestui que trust*, or creditor. *Martin and Yerger* 361, 3*rd Yerger*, 11; *Perry on Trusts, section* 863. It is equally well settled, however, that the statute does run, (when relied upon) in favor of a defendant sought to be charged with a resulting, or an implied or constructive trust *Perry on Trusts, section* 865. But it is not a question in this case between the State or the borrowing company, and the bondholders claiming to be beneficiaries. The question is one between the Knoxville and Ohio Railroad Company, an entirely different person, and the bondholders. Even in the most favorable light to complainant this defendant could only be charged with a trust by construction; and as against such a trust the statute does run, whenever it is plead and relied upon. The defendant in this case holds adversely to both the State, the borrowing company and the bondholder It holds for itself and adversely to everybody else. In *Llewellin vs. Mackworth*, 3*rd Eq., Cases Ab.* 579, Lord Hardwicke said: "The rule that the statute of limitations does not bar a trust estate holds only between the *cestui que trust* and trustee, not as between *cestui que trust* and *trustee* on the one side, and *strangers* on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both." *See* 1*st Sneed*, 297, 7*th Cold* 595. The lien reserved by the statute was vested in the State. By the terms

of the contract, or deed creating the trust, power is given to the trustee to deal with said lien in any manner deemed necessary to protect her own interest and secure her against loss on account of her liability as surety. There was no part of the legal title in the *cestui que trust.* His right, if he had any, was one in equity only, but fully sufficient to protect him whenever the aid of that tribunal was invoked The trustee, the State, in breach of the trust, if complainant would so have it, sold or caused to be sold and conveyed, the trust estate to the defendant, who was and is an innocent purchaser, without notice. In such case there is no trust, even by construction. *Perry on Trusts section* 860 If so, the *cestui que trust's* remedy is against the trustee, and not against the property in the hands of this defendant. But if there *could* be a trust by implication or construction, charging the property in the hands of this defendant, the same is now barred. It is well settled that if the trustee having the legal title is barred by the statute of limitations, the *cestui que trust* is also barred, *though an infant.* 1*st Sneed* 297. This principle would bar a *cestui que trust* in such a case, though laboring under any and every disability usually constituting an exception to the operation of the statute.

By a decree of the Chancery Court of Davidson county, in a cause to which the State, the Knoxville and Kentucky Railroad Company, the holders of the bonds issued to that road, the stockholders and creditors of that company, and all persons interested therein, were all regularly made defendants, a sale of the trust property was made, title divested out of all parties before the Court and vested in the purchasers, free from any and all liens, except a lien reserved for the purchase money bid at said sale. The purchasers were placed in possession in October, 1871, and they and their vendee, the defendant in this cause, have remained in the free, undisturbed exclusive, continuous and adverse possession and enjoyment of the same ever since, and until the bringing of this suit. The purchase money has been fully paid. Their vendee claims and has always claimed to hold the property absolutely as its own, discharged of any lien whatever in favor of the State or the State bondholder. The State is now forever barred, both at law and in equity, and *if there is any cestui que trust,* he is barred also. This defendant is an entire stranger to the contract between the State and its bondholders, or to any contract between the Knoxville and Kentucky Railroad Company and its creditors. There is no exception in the statute that will

save the bar against the complainants. Ignorance is not allowed, and if it were, could not be plead. The bill is framed upon the theory that the contract is so plain and unmistakable that the wayfaring man, though a fool, could not err in the construction thereof; and that they have always known their rights.

It is no answer to this plea, to say that the bonds for which the lien was given are not yet due and payable. Then why should *this* suit be brought? To collect the interest? Then, if that right exists now in favor of the bondholder, it has always existed in his favor, and he has always had the same right to sue that he now asserts. Then, has he labored under no disability. But independent of any statutory right, if he is a *cestui que trust*, he could have interposed and have prevented a sale of the trust property by the State, or by a bill in equity have prevented its waste or destruction, or enforced the proper application of the proceeds of a sale, if one be came or was necessary; or have saved the bar of the statute. A right of action accrued to the bondholder or his trustee, as soon as the defendant went into possession in 1871. No such interposition was made, and the bar of the statute is complete.

Again, it may be said in answer, that no statute runs against a sovereign State. That legal proposition is correct, but it doesn't apply If the State in her own sovereign right were seeking relief, it may be that we couldn't rely upon the statute; but when she assumes to act for another as trustee, she denudes herself of her sovereign character; and besides, she is not seeking any relief. She has parted with her right and title, and the case is that of a *cestui que trust* claiming through the State against a defendant holding adversely to the State and all others, under and by virtue of a decree procured to be made by the State and to which the State is legally a party. The general rule is that whatever estops the trustee estops the *cestui que trust*. This decree estops the State, and therefore estops the beneficiary, unless there has been fraud and collusion between the State and this defendant. This is not pretended.

As an example: *Whiteside vs Singleton, Meigs' Reports*, 207, was an action of ejectment by Whiteside against Singleton. It was claimed by plaintiff Whiteside that his title was perfected by reason of the statute of limitations. This was denied by defendant Singleton. The Court say, (Judge Turley delivering the opinion). "But it is said, thirdly and lastly, that

the lessors of the plaintiff have not title to all the lands in dispute, unless it be by operation of the statute of limitations. This is true, inasmuch as they have to deraign title through David Allison, the vendee of the grantees, and have only produced deeds of conveyance from a portion of his heirs. But it is deemed unnecessary to enter minutely into an investigation of this point, inasmuch as we are satisfied that the title of the lessors of the plaintiff has been perfected by the operation of the statute of limitations. It is proven that the possession of the disputed premises was taken by Jenkin Whiteside in 1813; and that the same was continued more than seven years by himself and those claiming under his title. At the time this possession was taken, John Overton and Jenkin Whiteside claimed title to all the land within the limits of the grant, by virtue of a deed of conveyance from Robert Hayes, Marshal of West Tennessee, bearing date 12th July, 1802. It is true that this deed of conveyance is founded upon a decree against David Allison, which is either void or voidable (it is unnecessary to determine which); for inasmuch as *the deed purports to convey* all the lands within the bounds of the grant, referring to it by number; and, inasmuch as we now determine that the premises in dispute are covered by the grant, *it follows according to all the decisions*, either on the statute of limitations of 1797, or on that of 1819, *that possession under the deed for seven years, will perfect the title, though it be founded on a voidable or* VOID *decree.*"

These adjudications upon the statute of limitations establish the fact that an estate in fee would vest and be protected by reason of the facts in this record. If the interest of the defendant is less than a fee, it is equally protected by that statute; and if the property or franchise purchased and held by the defendant should be held by the Court to be personalty, then a much shorter period of limitation protects defendant's title.

But aside from the legal, statutory bar, in a court of equity, acquiescence in a transaction may bar a party of relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he can not afterwards have relief. He is estopped by acquiescence, and can not undo that which has been done. So if a party stands by and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he can not afterwards have relief. His silence permits or encourages others to part with their money or property, and he can not complain

that his interests are affected. His *silence* is acquiescence, and it estops him." *Perry on Trusts, section 870.* The record fully develops the facts that make this principle applicable to this case. It is unnecessary to recount them. Whether, therefore, we apply the statute of limitation, or the doctrine of equitable estoppel, it is equally clear that the defense under them is perfect, and that their force and effect can neither be weakened nor avoided by fact or argument.

To recapitulate, we think we have shown: 1st, That the construction sought to be placed upon the act of 1852 by complainants is forced. unnatural and unreasonable. 2nd. That the fair and true construction of that act defeats the complainants of all relief. 3rd. That the construction contended for by us is that that has been practically given to the statute by common opinion, since its passage. 4th. That the officers whose duty it was to execute the law, so construed it. 5th. That the Legislature has always so construed the act, uniformly and without exception. 6th. That the judiciary of the State has affixed the same meaning to the terms of the contract. 7th. That the understanding of the parties has been the same, 8th. That similar acts in Missouri and Minnesota have been construed by the United States Courts, just as we construe this act. 9th. That under the facts of this case the construction is binding upon the Court. 10th. That the complainants are estopped hy the decrees of the Chancery Court of Davidson county, pronounced in the case of The State of Tennessee *vs.* The Edgefield and Kentucky Railroad Company and others. That complainants are equitably estopped by reason of the facts in the cause, and by their own acts. 12th. That the doctrine of subrogation does not and can not apply. 13th. That defendant is protected by the statute of limitations.

No one can regret or deplore the public sentiment now existing in Tennessee upon the subject of our public debt more thon I do—if I may be permitted the expression of my personal sentiment. It is the result of dishonest leadership and demagogism, and a matter for shame and reproach that it is so. But the fact that the State has failed to provide for the payment of her just and binding obligations is no reason why these defendants should be held liable for any portion thereof; or that they should be twice compelled to pay the same debt. Had it not been for this depraved public sentiment, defendants would never have been forced to bear even the ex-

pense of defending this suit. Such facts however, belong to the domain of politics. Although they are sufficient to make the honest citizen blush for shame, they furnish no reason or excuse for this attempt to make the railroads pay the State's debt.

There are many points that have been, and will be made by other counsel in the causes, applicable to this case, that we have not argued. These we ask and claim the benefit of. There are many points that might have been, that have not been discussed. One might easily write a book, and we suspect that our opponents have more than once mentally exclaimed, "Oh! that mine enemy *would* write a book;" in the hope that the mind of the Court might possibly become dissipated by "much learning," or that thereby an impression might be produced that there certainly must be *something* in a case that requires so much argument to convince the Court there was nothing in. We shall therefore desist. We beg the pardon of the Honorable Court for having already consumed so much space. It has been rendered necessary by reason of the positions assumed in argument by complaintan's counsel. We have been compelled to follow each *Will-o'-the-wisp* far enough to demonstrate that it was delusive and without substance.

Respectfully submitted by

WM. M. BAXTER,

Of Counsel and Solicitor for Defendants.